The Adoption of Specialised Competition Tribunals in Latin American Countries: Lessons from Mexico

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ABSTRACT

The adoption of specialised tribunals has become a widespread phenomenon notwithstanding the scarcity of empirical evidence about their real benefits. This thesis seeks to remedy such a gap by assessing the performance of the recently adopted specialised competition tribunal in Mexico. The analysis of the performance of this tribunal focuses on the feedback collected by the author in interviews with key stakeholders. In specific terms, this assessment reveals the nature and magnitude of the issues that led to the adoption of this new tribunal and the institutional reform it entailed.

In broad terms, it offers the three following implications. First, it provides experimental verification about the veracity of the three most common benefits attributed to specialised tribunals: efficiency, quality, and uniformity. Second, it confirms that as different institutions take part in the implementation of competition law, the performance of one institution influences another. In the event that the judiciary is unfamiliar with competition law, unskilled in economics, inclined to dispose antitrust cases based on procedural irregularities and delays, the functioning of the competition agencies is obscured, and the effective implementation of the competition law impeded. Third, it verifies the connection between country specific socio-economic conditions and levels of implementation of competition law. These implications derive from the analysis of the Mexican case and the commonalities shared between this country and some other Latin American countries.

The most important lesson to be learnt from the Mexican case is that the adoption of specialised competition tribunals is advisable to Latin American countries facing similar challenges in the implementation of competition law. Yet the lessons offered by the Mexican case provide vital insights but need to be carefully adapted to ensure a suitable transfer to other jurisdictions. For this purpose, this thesis offers a conceptual framework about transplants, which applied in conjunction with their domestic realities, predicts a successful replication. Finally, it offers recommendations on what needs to be considered when adopting a specialised competition tribunal.

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Table of Abbreviations

CAFC	Court of Appeals for the Federal Circuit
CAT	Competition Appeal Tribunal
CEPAL	Economic Commission for Latin America and the Caribbean
CFC	Federal Competition Commission
CFI	Court of First Instance of the European Communities
CJF	Federal Judicature Council
COFECE	Federal Economic Competition Commission
ICN	International Competition Network
ILO	International Labour Organisation
INDECOPI	National Institute for the Defense of Free Competition and the Protection of Intellectual Property
ECJ	European Court of Justice
EU	European Union
FECL	Federal Economic Competition Law
FIL	Foreign Investment Law
GATT	General Agreement on Tariffs and Trade
IFT	Federal Communications Institute
IMF	International Monetary Fund
LFCE	Federal Law of Economic Competition
NAFTA	North American Free Trade Agreement
NDP	National Development Plan

OECD	Organisation for Economic Co-operation and Development
PRI	Institutional Revolutionary Party
SECOFI	Ministry of Trade and Industrial Promotion
TDLC	Tribunal de Defensa de la Libre Competencia
TFJFA	Federal Court of Fiscal and Administrative Justice
UNCTAD	United Nations Conference on Trade and Development
WB	World Bank

Table of Legislation

Mexico

Mexican constitution 1857

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D. O. 2 April 2013

General Agreement 22/2013

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INTRODUCTION

Latin American countries display specific conditions that make the analysis of the adoption of specialised competition tribunals particularly stimulating. This region has been described as one of the most unequal in the world,[1] and has been characterised by unstable economies with low levels of development.[2] Inefficient and untrustworthy institutions generally control it. In particular, the judiciaries in Latin America have been identified as some of the most inefficient, ineffective, and corrupt in the world,[3] a situation that is aggravated by the dominance of the executive, which has diminished its independence.[4]

In relation to competition law, a lack of political will to implement it has been prominent and, for centuries, policies and governmental decisions have clashed with the interests of competition as a result. It was just after an imposed trade liberalisation process that Latin American countries were persuaded to adopt or modernise their competition regimes, as well as to create or reinforce their competition authorities.[5] Although the approach towards competition has been modified, the implementation of competition law is still deficient.[6]

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[1] Sebastian Edwards, *Crisis and Reform in Latin America – From Despair to Hope* (Oxford University Press 1995) 1

[2] Michal Gal, 'The Ecology of Antitrust' in *Competition, Competitiveness and Development: Lessons From Developing Countries* (UNCTAD 2004) 22

[3] Joseph Staats, Shaun Bowler, and Jonathan Hiskey, 'Measuring Judicial Performance in Latin America' (2005) 47 Latin American Politics & Society, University of Miami 4, 78

[4] Ryan Salzman and Adam Ramsey, 'Judging The Judiciary: Understanding Public Confidence in Latin American Courts' (2013) University of Miami, 78–79

[5] Gal (n 2) 23

[6] OECD, 'Competition in Latin America and the Caribbean, 10 years of the OECD – IBD Latin American Competition Forum' 5 <http://www.oecd.org/competition/latinamerica/competitioninlatinamericaandthecaribbean10yearsoftheoecd-idblatinamericancompetitionforum.htm> accessed 8 March 2018; Dina Waked, 'Antitrust Enforcement in Developing Countries: Reasons for Enforcement & Non-Enforcement using Resource-Based Evidence' (2010) 5th Annual Conference on Empirical Legal Studies Paper, 2–3 <https://dx.doi.org/10.2139/ssrn.1638874 > accessed 6 March 2018

Among the difficulties, the judiciary represents one of the main impediments to the implementation of competition law given its poor knowledge of competition law, the low levels of exposure to antitrust cases, and its excessive workload. Therefore, the main purpose of this research project is to test the hypothesis that the adoption of specialised competition tribunals is advisable in Latin American countries to tackle these issues.

Such characteristics, combined with the lack of conclusive evidence regarding the benefits of specialised tribunals, reinforce the pertinence of studying one of the most common alternatives contemplated to alleviate the inefficiency, ineffectiveness and unreliability that the judiciary faces: specialisation. This research project seeks to remedy this lack of empirical evidence regarding the real benefits of specialised tribunals, focusing on the recent adoption of the specialised competition tribunal in Mexico.

In light of the above, this research first concentrates on verifying through the opinions of key stakeholders whether this tribunal has managed to deliver the three most common factors attributed to specialisation – efficiency, quality, and uniformity – as well as establishing whether it has been affected by the most common drawback – loss of independence. Lawrence Baum has described these three factors as the neutral virtues of specialisation, and loss of independence as a consequent negative impact. He has also recognised the insufficiency of the empirical evidence testing such virtues and drawbacks, which is the reason why these factors have

been chosen.[7] Next, the research questions that this thesis aims to answer will be set out.

RESEARCH QUESTIONS

This research project aims to provide experiential evidence about the benefits of specialised competition tribunals, and to contribute to the literature on the necessity of specialised competition tribunals in Latin American countries. It will do so by exploring the following research questions.

1. Has the specialised competition tribunal in Mexico been beneficial in terms of efficiency, quality, and uniformity, and has it been afflicted by loss of independence?

2. Has the adoption of the specialised competition tribunal in Mexico been a product of inadvertence rather than design?

3. Is competition law a complex field in Latin American countries such that the adoption of specialised competition tribunals seems necessary?

4. Would specialised competition tribunals outperform general tribunals in Latin American countries?

5. Are specialised competition tribunals advisable for Latin American countries?

[7] Lawrence Baum, *Specializing the Courts* (The University of Chicago Press 2011) 32, 33, 37

METHODOLOGY

This research project is underpinned by the use of different methodologies that aim to answer the research questions listed above. The first methodology implemented in this research is doctrinal.

Doctrinal methodology

The review of secondary sources such as academic commentaries and studies from international organisations pertaining to the notion of specialised tribunals allowed the advancement of the theoretical framework on which this research project is based. These sources covered the alleged benefits and drawbacks of specialised tribunals, as well as the lack of empirical evidence in this regard, the necessity of adopting specialised tribunals in competition law, and the pertinence of adopting them in developing countries.

The study of primary sources such as legislation, as well as secondary sources such as parliamentary debates in Mexico, socio-legal studies, and Mexican governmental reports related to the case study, was fundamental to gain the required knowledge for an understanding of the implications of the adoption of a specialised competition tribunal in Mexico, and thereby extract some lessons that other Latin American countries could make applicable thanks to their regional commonalities – one of the main goals of this research project.

Questioning whether specialisation is advisable, this research project first undertook a literature review and identified two main streams within the relevant literature. On the one side, a cluster of scholars, among them

Judge Posner[8], and Baye and Wright,[9] consider that competition law is a highly complex matter. They consider that economics nourishes competition law and it would be unreal to expect a generalist judge to come to the right decision in antitrust cases based purely on precedents, untrained intuition and legal interpretation.

On the other side, Judge Leventhal[10], Wood[11] and Rakoff[12] do not support the need to adopt specialised competition tribunals since not all antitrust cases involve economic issues; judges just need a good sense of fairness to solve any case and practitioners are obliged to present the facts in such a manner that it is easy for judges to understand them.

The theoretical framework in relation to the study of specialised courts is based on Lawrence Baum. He has expressed his concern about the scarcity of empirical evidence which proves the veracity of the neutral virtues repeatedly assigned to these types of judiciary: efficiency, quality, and uniformity,[13] and the insufficiency of systematic comparable studies when some form of jurisdiction is transferred from a generalist to a specialised body.[14]

Based on the concern expressed by Baum, the purpose of this research project is to remedy the insufficiency of studies proving the veracity of

[8] Richard Posner, 'The Law and Economics of the Economic Expert Witness' (1999) 13 The Journal of Economic Perspectives 2, 91–99
[9] Michael Baye and Joshua Wright, 'Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals' (2010) Journal of Law and Economics, 5
[10] Statement by Judge Leventhal in David Currie and Frank Goodman, 'Judicial Review of Federal Administrative Action: Quest For The Optimum Forum' (1975) 75 Columbia Law Review 1, 80
[11] Diane Wood, 'Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?' (2013) 13 Chicago-Kent Journal of Intellectual Property 7
[12] Jed Rakoff, 'Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise' (2012) XVII Fordham Journal of Corporate & Financial Law 13
[13] Baum (n 7) 32, 33, 37
[14] Ibid.

the neutral virtues of specialisation by assessing the performance of the specialised competition tribunal in Mexico. At the same time, considering that when this tribunal was adopted some form of jurisdiction was transferred from a generalist to a specialised body, the goal is also to provide the required systematic study that is according to Baum currently absent from the pertinent literature. A qualitative methodology was also employed in this research, and its analysis will take place in the following section.

Qualitative Research

a. Overview

This research project aims to illuminate whether specialised competition tribunals are beneficial for Latin American countries. The assessment of the performance of the specialised competition tribunal in Mexico in terms of efficiency, quality, and uniformity is used to review whether this has been the case. Since this assessment is based on the personal opinions given by different key stakeholders, the use of a qualitative methodology to meet the objective appeared to be the most suitable.

The first reason why Mexico makes a good case study resides in the fact that when the specialised competition tribunal was adopted in Mexico, some form of jurisdiction was transferred from a generalist to a specialised body. Thus, in seeking to remedy the absence of such systematic studies from the pertinent literature, as mentioned by Baum, the example of Mexico is significant. At the same time, considering the recent adoption of such an institutional reform, Mexico offered the unique opportunity to interview the judges that were transferred, and

whose insights were crucial for the purpose of this research project. It was also very advantageous to interview the members of the Comisión Federal de Competencia Económica (COFECE) and the practitioners who witnessed such a transitional period.

A second reason rests on the commonalities among Latin American countries, which imply that the lessons offered by Mexico may be valuable for those Latin American countries facing similar challenges. Yet, in the same way that legal reforms cannot merely be transplanted, the lessons that can be learned from this experience should be prudently tailored to a country's specific conditions to avoid resistance or failure.

Another third reason is that competition law is a novel and complex field in Mexico, and its development has been compromised by a lack of knowledge of competition law amid the judiciary, along with a low level of competition culture, making Mexico a representative case study. Considering that the adoption of a specialised competition tribunal was intended to remedy such issues, the assessment of the performance of this specialised tribunal suits the emphasis of this research project. A description of the research sample is presented next.

b. Research sample

This research project focused on the experience of the following three stakeholder groups:

1. Members of the specialised competition tribunal in Mexico
2. Members of the competition authority in Mexico – COFECE
3. Practitioners who worked in the field of competition law in Mexico

c. Chosen criteria

The members of the specialised competition tribunal were chosen because they were all generalist judges responsible for reviewing antitrust cases, and were now part of the specialised competition tribunal. This circumstance offered a unique opportunity to reveal how they approached the review of antitrust cases as generalists, and how they now approached it as specialists. This made their perceptions very valuable for the purpose of this research project.

In relation to the members of the Mexican competition authority – COFECE – who make the decisions in antitrust cases, the chosen criteria refer to the opportunity they had to deal with the review of their decisions before generalist judges, and the experience they subsequently had of having their decisions reviewed by specialists.

Finally, the practitioners who worked in the field of competition law in Mexico were chosen because they could offer valuable personal opinions about their experience, having had the opportunity to defend their clients before generalist judges previously responsible for the review of antitrust cases, and subsequently to defend them before the new specialised competition tribunal. Thus by having different perspectives from these three different groups, the data could be analysed in different ways and the different insights contrasted. This helped underpin the validity of the outcomes.

One of the shortcomings of the empirical research was the lack of interviews with businesses or third parties; whose could have been collected. Their opinions would have enriched the analysis, but due to

financial and time restraints such groups of stakeholders were not included. Nevertheless, such a weakness does not compromise the findings that this research project provides considering the large number of other key stakeholders interviewed. In future, research containing insights from third parties would enhance the debate.

d. Number of participants

A total of sixteen interviewees were conducted: four tribunal members; four COFECE members, plus two from fieldwork; five practitioners, and one via Skype.

The specialised competition tribunal consists of eight members (six magistrates responsible for the appeal instance, and two judges responsible for the first instance). On 20th January 2017 letters were addressed to every member explaining the nature and purpose of this research project, and requesting their participation as interviewees. The letters were attached to emails sent to each member, and this was followed up with phone calls to their secretaries during the following weeks. As a result, three magistrates and one judge agreed to take part in the interviews, meaning that 50% of the members of the specialised tribunal were interviewed. The other 50% did not respond.

With respect to the Mexican competition authority – COFECE – six members comprise the board of commissioners. On 29th November 2016 letters were sent by email to all six requesting their participation as interviewees. Four members agreed to take part (66.6%) and the other

two did not respond. During fieldwork in Mexico, two members of the investigative department of COFECE were contacted and interviewed.

Practitioners were identified using “the Legal 500”, a website that contains information about the best law firms in Latin America. Ten practitioners whose reviews were outstanding were chosen. By the time the sample was examined, the total number of outstanding practitioners in competition law had fallen, and therefore ten practitioners was considered sufficient for the purpose of this research project.

The timeframe was also a factor; the researcher spent just two weeks in Mexico interviewing all of the stakeholders, so it was a rational choice to limit the number of practitioners. On 13th December 2016 letters were sent by email to all of the practitioners requesting their participation as interviewees. Five practitioners agreed; the rest did not respond. One more practitioner was interviewed via Skype; contact had been made with him previously during fieldwork in Mexico.

The number of participants from each stakeholder group constituted a representative sample, and their diversity provided contrasting perspectives. The participants in general could be described as high profile, considering that they were expert lawyers or economists who served with the judiciary, with the executive, or with prestigious law firms. The majority of them were over 40 years old. The fact that all of the participants were specialists in competition law is significant for the analysis of the data collected, because their expertise in such eminent positions indicates that their opinions were serious, objective, and reflective.

e. Overview of information needed

The type of information sought from the participants centred on their perceptions of the performance of the specialised competition tribunal in Mexico. Thus, similar questions were addressed to each of the participants, and their answers allowed a direct comparison and analysis. Considering that the emphasis was to collect their perceptions grounded on their personal experiences, semi-structured[15] interviews were considered the most suitable, as the open questions enabled them to freely expand on their answers.

At this juncture, it is important to mention as a caveat that due to financial and time restraints this research project did not examine or compare judicial review decisions made by generalist judges with decisions made by the specialised competition tribunal. The collection of data in this regard was cumbersome. Additionally, as Chapter 2 will explore in more detail, the analysis of the quality of the judicial decisions is a difficult undertaking, and a reason why this research limited its scope to the insights of the interviewees in this sense.

f. Research design overview

The interviews took place during fieldwork in Mexico City from the 8th to the 29th March 2017. The dates, times, and locations were chosen at the convenience of the participants. As indicated earlier, one interview was conducted via Skype. Overall, the length of the interviews ranged

[15] Semi-structured interviews consist of a guided but open questions dialogue, where the respondents present their descriptions and narratives more spontaneously and more deeply. Svend Brinkmann, *Encyclopedia of Critical Psychology* (Springer Link 2014) <https://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-5583-7_161> accessed 11 January 2019.

from 30 minutes to one hour. Considering that the participants were high profile, timekeeping was important. As a precautionary measure, the interviews were simultaneously recorded using a recorder, a mobile phone, and a laptop. The researcher undertook the transcription process of the recorded interviews.

g. Data analysis and synthesis

An Excel™ table was created as a repository of the data. Similar questions were addressed to the different stakeholder groups, so each question formed a category. Each stakeholder group was also categorised. Thus, the table comprised the number and type of participant responses, as well as the frequency of participant responses against each category. The Excel™ table was used to visualise and analyse the data developed, and then as the coding scheme of this research method by categorising the questions and the participants, and by permitting a comparison across them. Such a comparison facilitated the assessment of the performance of the specialised competition tribunal in Mexico, and contributed to the implications of the analysis.

Participants who took part in interviews were given alphabetised labels to preserve their anonymity (Member A, B, C, D; COFECE A, B, C, D, E, F; Practitioner A, B, C, D, E, F), and the analysis of the data reported their opinions under these labels.

h. Ethical considerations

The Queen Mary Ethics of Research Committee deliberated the ethical considerations of the proposed research, arriving at the conclusion that

the "*...proposed work does not present any ethical concerns; is extremely low risk; and thus does not require the scrutiny of the full Research Ethics Committee...*" (Ref: QMREC1786a).

The structure of this thesis is presented next.

STRUCTURE

This thesis is structured as follows. Chapter 1 starts by providing a conceptual framework about transplants. It was decided to present such an analysis at this stages since the topic is complex, and its understanding is essential for any country contemplating the incorporation of lessons provided by the Mexican case. Relevant commonalities between Mexico and some other Latin American countries are also presented throughout Chapter 1. Linking the theoretical framework with such similarities serves as a guideline to incorporate the outcomes of this research project with the domestic realities of each Latin American country. Similarly, it assists with the elaboration of the answers to research questions 4 and 5.

Following the formulation of the theoretical framework, Chapter 2 then examines the scarcity of empirical evidence about the real benefits and drawbacks of specialised tribunals. Drawing on this analysis, Chapter 2 continues to examine the different arguments in favour of, and against, specialised tribunals in competition law, and explores the arguments that support and disregard the advisability of specialised competition tribunals in developing countries.

Section 2.4 examines the role played by international organisations, advocating for the adoption of specialised tribunals and focusing

primarily on the recommendations given to Latin American countries to adopt specialised tribunals in competition law. The main purpose of Chapter 2, then, is to justify the necessity of advancing the study of specialised tribunals and their adoption in the field of competition law, particularly in developing countries. At the same time, the theoretical insights of Chapter 2 serve as a cornerstone in the formulation of research questions 1 and 3.

Chapter 3 explains the choice of Mexico as a case study. It analyses the characteristics of the Mexican markets in an attempt to establish how challenging it is to supervise them. Section 3.2 provides a background overview of the structure and functioning of the judiciary. This overview includes the main challenges faced by the judiciary in Mexico, such as the dominance of the executive branch, the widespread corruption, and the excessive workload. Section 3.3 offers a perspective on the development of Mexican competition regimes, and the country's competition authorities. Section 3.4 examines the review process before and after the adoption of the specialised competition tribunal, aiming to offer a full picture of the implications of having created this type of judiciary in Mexico.

The analysis provided by Chapter 3 shows the magnitude of the issues that surrounded the adoption of such an institutional reform. Having presented the domestic realities of Mexico in Chapter 3, Chapter 4 assesses the performance of this specialised competition tribunal in terms of efficiency, quality, and uniformity. The assessment is based on the perceptions of the members of the specialised competition tribunal, the members of one of the competition authorities in Mexico – COFECE –

and the perceptions of some practitioners working in that field in Mexico, who were interviewed for the purpose of this research project.

The conclusions regarding the performance of this tribunal derive from comparing and calculating the number of times that the different insights of the respondents matched. The data analysis offered in Chapter 4 aims to contribute to answering research questions 1, 3, 4 and 5. Finally, Chapter 5 draws the strands of the thesis together, confirming the findings and revealing their wider implications. These findings are divided into broad and narrow. The broad findings reflect the overall implications of the analysis, where a generalisation takes place based on the similarities between Mexico and some other Latin American countries previously described in Chapter 1.

Section 5.1.1 presents the narrow findings, which consist of the reasons behind the results shown by the specialised competition tribunal in Mexico. Among these are the *amparo* action, poor knowledge of competition, low levels of exposure, market characteristics, and the obstacles that impeded a better development of the Mexican competition regime. Section 5.1.2 addresses all of the research questions, using the Mexican case to deduce broader conclusions for Latin American countries facing similar challenges in terms of the implementation of competition law and remedies to be sought.

The crucial insights of this research project advance the study of the real benefits of specialised tribunals. The findings also contribute to elucidating that, in light of the specific conditions of developing countries, and in particular those of Latin American countries, the adoption of specialised competition tribunals is advisable. This

conclusion derives from the analysis of the Mexican case, whereby the findings become generally applicable thanks to the commonalities between countries, and the theory of transplants.

CONCLUSIONS

This introductory chapter aimed to give an overview of the research methodologies used to address the research questions formulated in this thesis. One method used to answer the questions was doctrinal. Extensive literature was reviewed to present the different discussions about the presumed benefits of specialised tribunals: efficiency, quality, and uniformity, as well as the alleged drawback, loss of independence. The literature review looked at the arguments that have arisen among scholars as to the necessity of specialised tribunals in competition law, and particularly as to the advisability of the adoption of these tribunals in developing countries.

In seeking to address the different research questions, a qualitative methodology was also applied. Three different groups of stakeholders were interviewed for this purpose: 1) members of the specialised competition tribunal in Mexico; 2) members of the competition authority in Mexico – COFECE; and 3) practitioners in the field of competition law in the country. The reason why these stakeholders were chosen was because all of them experienced the transition from being generalist judges responsible for the review process of antitrust cases to being specialists instead.

A representative number of stakeholders from each group were interviewed, and this diversity of perspectives gives enhanced support to

the findings of this research project. The extensive review of literature, combined with the significant number of interviews, provide this research project with an exceptional and comprehensive synopsis of the implications of the adoption of a specialised competition tribunal in Mexico. This thesis also represents a remarkable opportunity to provide experiential analysis, and the prospect of offering some lessons. The next chapter presents the theoretical framework and the commonalities.

CHAPTER 1

Transplants and commonalities among Latin American countries

INTRODUCTION

One of the main objectives of this research project is to offer some lessons to Latin American countries searching for practical solutions to problems similar to those experienced in Mexico and which provoked the adoption of a specialised competition tribunal. In transferring such lessons it is crucial that policymakers within governments understand the analysis of the transplantation phenomenon. The review of relevant literature evidences that the transplantation of legal systems, institutions or lessons is a complex matter.[16]

Observing what has been done elsewhere, and how, offers a good comparison opportunity for countries looking to diagnose the strengths and weaknesses of its own institutions, policies, programmes, or laws under enquiry, and to quickly transfer the adopted lessons that have been previously tested elsewhere.[17] Nevertheless, such adaptation requires the theoretical insights detailed in Section 1 of this chapter if failures are to be avoided. Lessons from other countries also need to be aligned with prevailing informal institutions (Section 1.1.1.).

Since the analysis of transplantation is complex, and its comprehension crucial, the first aim of Section 1 is to provide a general conceptual framework of the most common definitions of the terms necessary for an

[16] Juan Couyoumdjian, 'Are Institutional Transplants Viable? An examination in light of the proposals by Jeremy Bentham' (2012) 8 Journal of Institutional Economics 494
[17] Richard Rose, *Learning from Comparative Public Policy: A Practical Guide* (Routledge 2004) 3, 6.

understanding of the transplantation phenomenon, and the most relevant theories that underpin its advance. The focus centres on the study of the following concepts: 1) institutions; 2) transplants; 3) institutional change; 4) culture; and 5) design of institutional transplants.

In relation to institutions, these are generally understood as being restraints humanly devised to bring order within society, and may be formal or informal. Equally, the study of the judiciary as institution reveals the importance of having independent and effective judiciaries, and brings attention to how dependent, inefficient, poor-quality, inconsistent, and ineffective judiciaries impact the legitimacy of such a branch. This section also presents a general framework for legal transplants, whose examination confirms that the debates around the correlation between law and society are abundant and remain unsettled, and that the theories around transplant phenomena are plenty, complex, and profoundly divided.

Section 1 also helps highlight that, despite the unsettled nature of the debate, different motivations promote the vast use of transplants, particularly among developing countries. A typology based on such motivations has been designed (Section 1.1.2). Regardless of the motivation, it appears that the success or failure of transplants rests on the compatibility or not between the prevailing informal institutions of the recipient, such as social or cultural factors, and the new transplanted institution, such as a specialised tribunal.

With a view to providing a better understanding of the likelihood of acceptance or rejection of a transplanted formal institution, Section 1 also illustrates how and why institutions change. From this, an analysis of

different theories is offered. The New Institutional Economics doctrine serves the purpose of this research project particularly well by clarifying that informal institutions are drivers of change, that they allow the embedment of formal institutions, and that formal and informal institutions change at different paces.

In addition, and with a view to exploring the notion of informal institutions in more detail, Section 1 provides an analysis of the four main streams of research that explain how the acquirement of culture occurs. The results of this evolutionary anthropology approach are significant in the way they exemplify how culture is an intrinsic part of the individual and their development. Therefore, neglecting the study of culture when analysing the transplantation of institutions would be deficient. In relation to the design of transplants, Section 1 contrasts the various alternatives and shows that the ones most likely to succeed are those that recognise the importance of considering local needs, local knowledge, and local prevailing informal institutions.

Against this backdrop, the second aim of this chapter is to set the scene for a feasible transplant of the lessons provided by the Mexican case. For this purpose, some commonalities among Latin American countries are presented in order to ascertain whether the transplant of specialised courts is feasible and, indeed, desirable. The identification of such commonalities reinforces Mexico as a relevant case, and by linking the theoretical framework provided in Section 1.1 with the established commonalities detailed in Section 1.2, we should be able to ascertain whether Latin American countries searching for practical solutions to the same issues can use the Mexican experience to suit their specific needs.

A more detailed study of the commonalities present among Latin American countries relates to the recently introduced reinforcement of competition law and policy, looking at when Latin American countries adopted their competition regimes, when their competition agencies were created, which countries have specialised competition tribunals, and the fact that their levels of enforcement are estimated to be lower than in developed countries. This analysis reveals that the majority of Latin American countries have emerging or weak competition agencies, newly adopted competition regimes, general tribunals reviewing antitrust cases, and lower levels of enforcement compared to advanced economies.

Subsequently, Section 1.1.4 undertakes an assessment of levels of a culture of competition, seeking to show the suitability of Mexico as a case study, as this country is afflicted by most of the same conditions as the majority of the Latin American countries. The detailed examination of such challenging economic structures shared by the majority of the Latin American countries, besides serving as a gauge to infer levels of a culture of competition, also provokes some reflections on the quality of the review process in antitrust cases, as it will be explained at a later stage.

Finally, Section 1.2 explores the levels of credibility of the judiciaries in Latin America. The objective of such analysis is to establish an indirect link between the levels of credibility enjoyed by the judiciary and the implementation of competition law. The argument goes that courts review whether the competition authority has interpreted and applied the law correctly, as well as whether the evidence used supports the conclusion,[18] so that if the public does not perceive the judiciary as

[18] Maciej Bernatt, 'Explaining Judicial Deference in Competition Law' https://eulawenforcement.com/?p=727 accessed 28 September 2019

credible, that may signify inefficient and poor quality decision-making[19] could be derived from a limited implementation of competition law.

The analysis in Section 1.1 proceeds as follows. First it explores the meaning of institutions. Second, it analyses the advancement of the theoretical framework of transplants. Third, it presents the different theories of institutional change. Fourth, it studies the definition of culture and its effect on institutions. Fifth, it describes the different designs of transplants, and provides some recommendations to avoid failure. Finally, it provides concluding remarks.

Section 1.2 is structured as follows. First, it presents a general introduction to the main characteristics of the judiciary systems and the economies in Latin America. Second, it looks at when the competition regimes were adopted or modernised, when the competition authorities were created, which Latin American countries have specialised competition tribunals, and explores levels of enforcement.

Third, it examines some indicators seeking to provoke inferences in relation to levels of competition culture, underlying that higher levels are expected in countries where specialist competition tribunals exist.[20] The indicators are: a) income classification; b) poverty; c) economic growth and prosperity; d) barriers to entry; e) barriers to import; f) informal economy; and g) infrastructure. In light of the above, the assumption is that if low levels of a culture of competition are established then the

[19] The role of the judiciary in the implementation of competition policy has been examined by the OECD, 'Policy Roundtables, Judicial Enforcement of Competition Law' (1996) 10 <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf> accessed 28 September 2019.

[20] ICN Advocacy Working Group, Competition Culture Project Report (2015) 3, 4 <https://centrocedec.files.wordpress.com/2015/07/competition-culture-report-2015.pdf> accessed 16 August 2018

adoption of a specialised competition tribunal may seem advisable to increase the levels of awareness. Fourth, it explores the levels of credibility of the judiciaries in Latin America. Finally, it provides concluding remarks.

1.1. TRANSPLANTS

There has been considerable research into and interest in the concepts of institutions, and transplants, as well as their relevance in policy development.[21] The large number of studies seeking to explain these concepts has in fact impinged their understanding, due to the ambiguity and inconsistency observed in the use of terms, and in the explanatory process of the existing theories.[22] To address this challenge, this section aims to describe and summarise the most common concepts, arguments, and theories in an attempt to gain a good understanding of the transplantation phenomenon, since the subject matter of this research pertains to the possible transplantation of specialised competition tribunals – an example of a formal institution.

1.1.1. INSTITUTIONS

The literature review provides the most common definition of institutions, that given by North, according to which institutions are understood as the "*rules of the game in a society, or, more formally, are the humanly devised constraints that shape human interaction*",[23] represented also as economic and political agents interacting under a

[21] Geoffrey Hodgson, 'What Are Institutions' (2006) XL Journal of Economic Issues 1, 1
[22] Christopher Kingston and Gonzalo Caballero, 'Comparing Theories of Institutional Change' (2009) 5:2 Journal of Institutional Economics, 151–152; Hodgson (n 21) 1
[23] Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 3

shared system of encouragements[24] or as "*stable patterns in social interactions*".[25] Institutions are also defined as "*a set of rules that structure social interactions in particular ways*",[26] instruments used to create steady expectations of the behaviour of others by imposing constraints,[27] simply as the outcomes of human relations and desires,[28] or "*as durable systems of established and embedded social rules that structure social interactions*".[29]

Institutions have also been considered as "*a complex of status-role relationships, which is concerned with a particular area of activity within any specified social system*".[30] Equally, it has been indicated that individuals create institutions as an external tool in an attempt to give structure and order to their environment.[31]

The above human-created institutions are defined as either formal or informal. Formal institutions are positive, explicit or written down, enforced by a third party,[32] and usually observed for example in the form of constitutions and laws.[33] Informal institutions are not written down, are

[24] Couyoumdjian (n 16) 491
[25] Martin De Jong, Konstantinos Lalenis and Virginie Mamadouh, 'An Introduction to Institutional Transplantation' in *The Theory and Practice of Institutional Transplantation* (Kluwer Academic Publishers 2002) 3
[26] Jack Knight, *Institutions and Social Conflict* (Cambridge University Press 1992) 2
[27] Geoffrey Hodgson (n 21) 2
[28] Ibid. 8
[29] Ibid. 13
[30] Howard Kaplan, 'The Concept of Institution: A Review, Evaluation, and Suggested Research Procedure' (1960) 39 Social Forces 2, 179
[31] Douglas North and Arthur Denzau, 'Shared Mental Models: Ideologies and Institutions' (1994) 47 Kyklos 4
[32] North (n 23) 4; Kingston and Caballero (n 22) 154; Nils Goldschmidt, 'A Cultural Approach to Economics' (2006) Intereconomics 177; Gerard Roland, 'Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions' (2004) 38 Studies in Comparative International Development 4, 111; Martin De Jong and Suzan Stoter 'Institutional Transplantation and The Rule of Law: How This Interdisciplinary Method Can Enhance The Legitimacy Of International Organisations' (2009) 2 Erasmus Law Review 03, 318; Martin De Jong, 'The Pitfalls of Family Resemblance: Why Transferring Planning Institutions Between "Similar Countries" is Delicate Business' (2004) 12 European Planning Studies 7, 1057–1058
[33] Couyoumdjian (n 16) 491

self-enforced, and exemplified as social norms or conventions derived from moral codes, ideologies, or culture.[34]

From the cluster of definitions presented earlier it could be said that institutions are essentially humanly devised constraints, whether formal or informal, which aim to bring order to social interactions. Considering that the focus of this research project rests on the assessment of the performance of the specialised competition tribunal in Mexico, the next step is therefore to study the judiciary as an institution.

a. The judiciary as formal institution

Of the three main institutional powers within the state, the judiciary has been seen as the weakest or perhaps the most neglected; in the words of Hamilton, the executive holds the *sword*, the legislature commands the *purse*, while the judiciary does not have influence over the sword or the purse.[35] Research has also focused on the legislative and the executive, neglecting the study of law and courts, particularly in Latin America.[36] Despite this apparent disadvantage, the judiciary is in fact the formal institution that limits the power of the executive and legislative under the "checks and balances" role, by independently enforcing the law, and reviewing that law and policymaking comply with the constitution, so becoming the final arbiter of the law.[37]

[34] Kingston and Caballero (n 22) 158; De Jong and Stoter (n 32) 318; Roland (n 32) 111; De Jong (n 32), 1057–1058; Couyoumdjian (n 16) 491; Nils Goldschmidt (n 32) 177
[35] Alexander Hamilton, John Madison and John Jay, *The Federalist Papers* (Signet Classic 2003) 464; Ralf Dahrendorf, 'A Confusion of Powers: Politics and The Rule of Law' (1977) 40 The Modern Law Review 1, 8
[36] Staats, Bowler and Hiskey (n 3) 77–78
[37] Rafael La Porta, Florencio Lopez-de-Silanes, Cristian Pop-Eleches and Andrei Shleifer, 'Judicial Checks and Balances' (2004) 112 Journal of Political Economy, 2–4

In the field of human rights, the judiciary constitutes one of the most important institutions, whose function consists in protecting and promoting said rights.[38] Regarding the interaction between public authorities and individuals, the judiciary protects the latter from arbitrary state action, and ensures their civic and political liberties.[39] In relation to the rule of law, it has been widely agreed among scholars that an independent and effective judiciary is a vital factor for its application.[40]

Economic freedom and economic growth have been equally correlated with independent and efficient judiciaries, under the assumption that the protection of property rights via enforced agreements leads to more developed credit markets, as this reduces the uncertainty of rights not being upheld and increases the willingness to invest more.[41]

The notion of an independent judiciary refers broadly to the ability to perform, detached from any external political influence from the executive or the legislative, and particularly to the ability of every judge to make autonomous decisions.[42] The relevant literature claims that independent courts are essential to effectively review competition decisions and to adjudicate competition law disputes between private parties.[43] For this reason, it is essential to observe the following structural

[38] Winston Langley, *Encyclopedia of Human Rights Issues since 1945* (Greenwood Publishing Group 1999) 174–175
[39] Staats, Bowler and Hiskey (n 3) 78
[40] Kenneth Dam, *The Rule Of Law And Economic Development* (Brookings Institution Press 2007) 93; Staats, Bowler and Hiskey (n 3) 78
[41] La Porta, Lopez-de-Silanes, Pop-Eleches and Shleifer (n 37) 3; Kenneth Dam (n 40) 21, 93–95; Sean Dougherty, 'Boosting Growth and Reducing Informality in Mexico' (2015) OECD Economics Department Working Papers No. 1188, 22–23 <https://www.oecd-ilibrary.org/economics/boosting-growth-and-reducing-informality-in-mexico_5js4w28dnn28-en> accessed 12 July 2018; Giuliana Palumbo, Giulia Giupponi, Luca Nunziata and Juan Mora-Sanguinetti, 'The Economics of Civil Justice: New Cross-Country Data and Empirics' (2013) OECD, Economics Department Working Papers No. 1060, 2 <https://www.oecd-ilibrary.org/economics/the-economics-of-civil-justice_5k41w04ds6kf-en> accessed 13 July 2018
[42] Staats, Bowler and Hiskey (n 3) 79–80
[43] OECD, 'Judicial Perspectives on Competition Law' (2017) 3

factors: 1) selection and promotion based on merit rather than on political criteria;[44] 2) good salaries and prohibition to reduce them;[45] 3) life tenure with the only possibility of being removed for cause;[46] 4) fair transfers and promotions according to pre-established rules;[47] and, 5) impartial assignment of cases.[48]

Judicial effectiveness broadly refers to enforcement, under the premise that good laws cannot substitute a judiciary system incapable of making them enforceable, or that good laws can turn into bad ones if they are not applicable, and even that any effort to improve substantive laws is meaningless if they are not enforced.[49] This effectiveness constitutes one among several indicators used to measure the performance of the judiciary, where factors such as efficiency, quality, and uniformity have been commonly included.[50] In general terms, efficiency refers to the time to disposition of a case,[51] quality reflects the knowledge of the law and its correct application,[52] and uniformity means producing similar decisions in factually similar disputes.

This section has reviewed the general notions of independence and effectiveness, and Section 1.1.2 explores where the legitimacy of the judiciary rests. As the judiciary lacks the '*sword*' or the '*purse*', its legitimacy resides in the levels of acceptance from the citizens.[53] Thus,

[44] Dam (n 40) 115
[45] Ibid. 113–114
[46] Ibid. 114
[47] Randall Peerenboom, 'Toward a Methodology for Successful Legal Transplants' (2013) 1 The Chinese Journal of Comparative Law 1, 16
[48] Ibid.
[49] Dam (n 40) 93–95
[50] Staats, Bowler and Hiskey (n 3) 79–80
[51] Dam (n 40) 101
[52] Staats, Bowler and Hiskey (n 3) 94
[53] John Yoo, 'In Defense of the Court's Legitimacy' (2001) 68 The University of Chicago Law Review, 781

when a judiciary is independent, effective, efficient, makes accurate and uniform decisions, positively influences the general perceptions of the public and translates them into acceptance, then the institution is provided with legitimacy.

Research has shown that citizens of countries with well-performing judiciaries express greater confidence in those institutions,[54] which is not the case if the judiciary is not independent or effective. If the judiciary system is slow, uncertain, costly, ineffective, biased, or if decisions are contradictory or of poor quality, citizens will bring their cases with scepticism or will abstain from bringing them. Equally, the powers of the executive and legislative will be limitless, the respect for human, civic, and political rights will be compromised, the implementation of the rule of law will be undermined, and the fostering of economic development will be hindered.

Having established the importance of an effective judicial system, we now look at the assessment of the performance of the specialised competition tribunal in Mexico in terms of efficiency, quality, and uniformity. This examination will help establish whether this new institution has enhanced the levels of acceptance of the judiciary system and therefore its legitimacy. The analysis of the perceptions of the interviewees are instructive in this respect. At the same time, these three factors – efficiency, quality, and uniformity – against which the assessment will take place, derive from the above theoretical analysis.

After providing a basic definition of the concept of institutions, and a general analysis of the judiciary as institution, in order to thread out the

[54] Salzman and Ramsey (n 4) 88

factors of effective performance, Section 1.1.2 explores the meaning of transplants of institutions. This discussion is important, as it will allow conclusions to be drawn with regard to the transplantation of specialised courts, as institutions.

1.1.2. THEORETICAL FRAMEWORK

The examination of the relevant literature shows that the debate around how law and society correlate is unsettled. The same can be said of the transplant phenomena. With respect to effective legal transplants, the relevant theories are often contradictory and complex. Despite the unsettledness, different motivations promote the widespread use of transplants, particularly among developing countries. One example that illustrates this scenario refers to developing countries adopting or modernising their competition regimes, as well as to creating or strengthening their competition authorities during the 1990s, in pursuit of financial aids.[55] The success or failure of transplants is not easy to predict, but it appears that when problems arise it is essentially when social and cultural factors of the recipient country are abstracted from the analysis, or when similarities and differences are not evaluated, making the chosen case unsuitable.

Transplant is a word that has been introduced to the legal world to describe the "*phenomenon of borrowing, copying, or mirroring the laws or rules or institutions of one society for use in another*".[56] As with laws, rules or institutions, lessons can also be transferred from one place to another. Incessantly, countries have been searching for experiences from

[55] Gal (n 2) 23
[56] Roger Cotterrell, 'Is there a Theory of Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Oregon: Hart Publishing 2001) 73

elsewhere in the hope of finding solutions to their own problems by adopting what has worked in parallel environments.[57]

The advisability of transplants has been the source of endless debate. In Montesquieu's view it was implausible that the law of one country might fit into the legal system of another,[58] while Bentham advocated for the transfer of one-size-fits-all,[59] the same position demonstrated by Watson, who considered the extent of Roman law as the best way to exemplify how institutions can easily be adopted,[60] under the assumption that "*legal rules move easily and are accepted into the system without too great difficulty [...] even when the rules come from a very different kind of system*".[61] This was further developed by theories claiming that law succeeds irrespective of the society in which it operates, or that law and rules are portable and autonomous, and can therefore be transplanted.[62]

Legrand, who estimated that the law is the product of culture-specific determinations, rejected Watson's proposition, claiming that once the law is moved to a different host culture the meaning changes immediately, making it impossible to transplant.[63] The same rejection has been shown by Cotterrell, who has expressed that it is not possible to find logic in legal transplants as the concept itself is unclear, complex, and the variables to measure success or failure too numerous and often undefined,

[57] Jerneja Penca, 'Transnational Legal Transplants and Legitimacy: The Example of "Clean" and "Green" Development Mechanisms' (2016) 36 Legal Studies 4, 706
[58] Marina Kurkchiyan, 'What to Expect from Institutional Transplants? An Experience of Setting Up Media Self-regulation in Russia and Bosnia' (2012) International Journal of Law in Context, 115–116
[59] Couyoumdjian (n 16) 497; Juan Couyoumdjian, 'An Expert at Work: Revisiting Jeremy Bentham's Proposals on Codification' (2008) 61 Kyklos 4, 505
[60] Kurkchiyan (n 58) 117
[61] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993)
[62] David Nelken, 'Toward a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures*, (Oregon: Hart Publishing 2001) 7–8
[63] Pierre Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 Maastricht Journal of European and Comparative Law 2, 114, 117

but most importantly because communities show different social relations that the law cannot harmonise or integrate entirely.[64]

Freund stated that in order to avoid rejection of a legal transplant, it was essential to appreciate the social and political context in which law was shaped.[65] Middle-way approaches have been considered, where the study of certain conditions has been contemplated to foresee transferability, first looking just at the similarities, then focusing on the divergences, and then evaluating both.[66] Later, a functionality theory was introduced, according to which the origin of the transplant is unimportant as long as it can serve well to address the same social need, underlining the importance of choosing a suitable case study.[67]

Likewise, with the aim of explaining transplant processes, a typology was developed based on the reasons that motivate them. First, the Cost-Saving Transplant, whose main driver is to save money and time when finding a solution to a new problem.[68] Second, the Externally Dictated Transplant, more common in developing countries and intended to satisfy foreign entities pursuing trade agreements, financial aid or political autonomy.[69] Third, the Entrepreneurial Transplant, where the motivation resides in the opportunity to gain expertise by adopting a foreign system, as well as to obtain political or economic benefits.[70] Fourth, the Legitimacy-

[64] Roger Cotterrell and Austin Sarat, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing Limited 2006) 8, 108, 116
[65] Nelken (n 62) 10
[66] Helen Xanthaki, *On Transferability of Legislative Solutions: The Functionality Test* in *Drafting Legislation – A Modern Approach* (Ashgate Publishing Limited 2008) 2; Helen Xanthaki, 'Legal Transplants in Legislation: Defusing The Trap' (2008) 57 The International and Comparative Law Quarterly 3, 661
[67] Xanthaki (n 66) 3; Xanthaki (n 66) 673
[68] Jonathan Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 The American Journal of Comparative Law, 845–846
[69] Ibid. 847–849
[70] Ibid. 849–851

Generating Transplant, which occurs due to the prestige of foreign models, common in developing countries suffering from weak institutions where the missing authority is sought via the act of importing such models.[71]

The use of transplants is common among developing countries, where their rejection has also been common.[72] Whether the transplantation is voluntary or forced, if it is cost-saving or builds legitimacy, it has been claimed that the foundation of the problem is that the incompatibility between imported formal institutions and the prevailing informal institutions in the receiving country is what hinders the levels of acceptance.[73] It is considered that local conditions play a more important role during the transplant process than the conditions of the donor.[74]

When examining the different theories around transplants, the approach according to which transplants are unthinkable loses validity when we consider that an effective way for countries to find solutions to their needs is by learning from the lessons offered by their counterparts, and by adapting them. In the same way, the one-size-fits-all approach, where the assumption is that blueprints work in every case, is idealistic considering that every country has a unique set of socio-economic conditions, and without a critical consideration about what is needed and how it is needed, the chances of success are reduced.

[71] Ibid. 854–857
[72] De Jong, Lalenis and Mamadouh (n 25) 278–279
[73] Nils Goldschmidt and Joachim Zweynert, 'The Two Transitions in Central and Eastern Europe as Processes of Institutional Transplantation' (2006) XL Journal of Economic Issues 4, 906
[74] Miller (n 68) 845; Pistor Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 European Economic Review 1, 165–168, 174, 180

The middle-way approaches seem to be more realistic, as the analysis of similarities or divergences, or both, as well as the examination of the suitability of the case study, is essential to make the replication feasible. Given that one of the purposes of this research project is to offer some lessons, the first thing that Latin American countries need to do is to establish whether Mexico is a suitable case study to satisfy their needs, the second is to determine their similarities or divergences, and the third is to adapt the lessons appropriately.

Such adaptation requires compatibility between the prevailing informal institutions, such as moral norms, customs, and culture, and the new adopted formal institution, in this case a specialised competition tribunal. Particularly in the catching-up period, the adaptation of a foreign formal institution or a foreign lesson tends to be a rapid process, whereas informal institutions change at a slow pace, resulting in an incompatibility between them.[75] For this reason, an understanding of how institutional change happens is essential, as Section 1.1.3 now shows.

1.1.3. INSTITUTIONAL CHANGE

This section shows that ignoring prevailing informal institutions endangers the levels of acceptance of transplanted formal institutions, in this case a specialised competition tribunal. At the same time, it explores the pace at which new formal transplanted institutions take root and why it is important to marry this with the natural pace at which prevailing informal institutions change. For this purpose, this section starts by briefly exploring the theories underpinning rational and collective choices

[75] Joachim Zweynert, '*Economic Culture and Transition'* in *Culture and Economics* (2006) Intereconomics, 182

(formal institutions) which downplay the role of informal rules (informal institutions) as drivers of change, moving to evolutionary theories where collective choices are inconceivable, and ending with a new movement where collective choices and informal rules work together as drivers of change. There follows a summary of the most important clusters of research in this area: 1) Collective choice; 2) Evolutionary theories; and 3) New Institutional Economics.

a. Collective choice theories

Collective choice theories suggest that the rationality of individuals, organisations, communities or the state promotes a change of rules aspiring to obtain their own benefit.[76] Some theories assign different roles to political actors, the judiciary, or third parties as drivers of institutional change.[77]

Collective choice theorists have considered the informal rules that can be collectively adopted, such as ethical codes or moral norms, as drivers of change. Informal norms, which cannot be rationally and collectively evaluated, and whose evolvement is spontaneous and decentralised, such as social norms and conventions (moral, ideologies, culture), have been ignored by such theorists.[78]

This collective choice approach rightly holds that individuals or communities promote institutional change but it fails to incorporate social conditions such as culture as promoters of it. The theory assumes that culture will also be ignored when the transplant of a formal institution is

[76] Kingston and Caballero (n 22) 155–157
[77] Ibid. 157–158
[78] Ibid. 158–160

contemplated. As a result, the compatibility gap between this informal institution and the new formal entity will be considerable, risking the levels of acceptance of the latter. For the purpose of this thesis, the compatibility gap suggests that if the specific social conditions of the Latin Americans countries contemplating the adoption of a specialised competition tribunal are not considered, then the risks of rejection of the incorporation of such a formal institution will be higher.

b. Evolutionary theories

The core of this cluster of theories centres on the Darwinian principles of variation, selection, and inheritance, as follows: where the change appears unintentionally or deliberately but in any case uncoordinated – variation; where the successful institutions remain and the unsuccessful disappear – selection; and where the replication derives from learning, imitation, and experimentation – inheritance.[79]

Evolutionary theories include informal rules as initiators of change but they are not seen as a product of collective action or political process.[80] The most important contribution of this theory is that informal rules are contemplated as initiators of change, but the theory does not explain why and how change happens from an uncoordinated process. It fails also to elaborate on why unsuccessful institutions remain, despite the apparent selection process, failing to justify the necessity of transplants if naturally unsuccessful institutions disappear, as in this case, an inefficient generalist court.

[79] Ibid.
[80] Ibid. 167

Most recently, a new approach has emerged, the New Institutional Economics, rooted in the interaction between formal rules (usually purposefully designed according to collective choice theories) and informal rules (usually spontaneously developed according to the evolutionary theories). This theory is explored in more detail next.

c. New Institutional Economics

According to Williamson, exogenously informal rules determine to what extent formal rules are embedded, according to four levels of institutions and the speed at which their rules change. Thus, it takes centuries or millennia for culture and norms to change (highest level – informal institutions), decades or centuries to change constitutions, laws, and property rights (second level – formal rules), years to change contractual relations (third level – institutions of governance), and a short time to change prices and quantities in individual contracts (lowest level).[81]

Subsequently, North advanced the recognition that informal rules are the core of institutional change, which coexist and evolve simultaneously with formal rules. He recognised that formal rules are the result of a political process (collective choice theories) fundamentally stimulated by informal rules, whose evolution reflects a process of cultural transmission (evolutionary theories).[82] In relation to how quick institutions change, North's view is that institutional change is the product of an enlargement of small changes; he saw change as gradual,[83] and path-dependent, as institutions evolve at the same time as mental models.[84]

[81] Ibid. 167–168
[82] Ibid. 168
[83] Ibid.
[84] Denzau and North (n 31) 22

Finally, Roland has argued that formal institutions change quickly and deliberately as products of a centralised political process called "fast-moving", while informal institutions change slowly, responding to a continuous, evolutionary and decentralised process that is "slow-moving".[85] Institutional change according to Roland is the result of an upheaval of informal institutions which speeds up the change of formal institutions.[86]

The New Institutional Economics doctrine serves the purpose of this research project by providing a valuable analysis which helps explain why it is important to find compatibility between the prevailing informal institutions of the recipient country and the new transferred formal institutions. The first important input is the recognition of informal institutions as drivers of change. The second is the identification of informal institutions as facilitators of embedment of formal rules. The third is the acknowledgment of the pace at which informal and formal institutions change – the former very slowly, and the latter rather fast. The last input is that informal institutions are more likely to endure than formal institutions.

From these deductions, it is evident why ignoring prevailing informal institutions endangers the levels of acceptance of transplanted formal institutions, in this case a specialised competition tribunal, as well as why it is important that the pace at which new formal transplanted institutions change encompasses the pace of prevailing informal ones. Section 1.1.4

[85] Roland (n 32) 110
[86] Kingston and Caballero (n 22) 168–169

studies the concept of culture in more detail in an attempt to provide a better understanding of informal rules as facilitators of embedment.

1.1.4. CULTURE

This section examines the concept of culture in order to specifically show how intrinsic is this factor to human behaviour and to appreciate why different cultures respond differently to the same incentive, in this case, the adoption of a specialised competition tribunal, which in some cases leads to acceptance and in others rejection. The study of the relevant literature suggests that culture plays an important role in the process of accepting imported formal institutions and presents the link between the various theories and the adoption of institutions.

The concept of culture has been the object of much academic study, with the assumption that the study of culture is indispensable for understanding human behaviour.[87] It has been argued that culture represents those customary beliefs and values that people acquire.[88] In explaining how the acquisition of these beliefs and values occurs, four main streams of research are relevant: 1) Standard Social Science Model (SSSM); 2) Evolutionary Psychology (EP); 3) cultural evolution; and 4) evolutionary anthropology.

According to the Standard Social Science Model, culture and social behaviour is a product of learning with no genetic contribution, while for the evolutionary psychologist the brain has a large number of innate

[87] Adam Jr Gifford, Reviewing: Robert Boyd and Peter Richerson, 'Not by Genes Alone: How Culture Transformed Human Evolution' (2008) Springer Science+Business Media, 193
[88] Ibid.; Luigi Guiso, Paola Sapienza and Luigi Zingales, 'Does Culture Affect Economic Outcomes?' (2006) 20 Journal of Economic Perspectives 2, 23

modules stimulated by specific social and environmental circumstances, which result in human behaviour.[89] F. A. Hayek, one of the main exponents of cultural evolution, contends that culture is not genetically transmitted nor rationally designed but is a process whereby culture and human reasoning develop concurrently.[90]

Successively, evolutionary anthropology's main contribution has been the proposition that there is an ontogenetic relation between biological and cultural evolution, where new forms of social cognition trigger new forms of cultural learning that in turn bring new cumulative cultural evolution, so social learning is the critical part of cultural development.[91]

This social learning is the result of an imitative process, rather than the emulative one used by some animals, that allows individual development at a social and cognitive level, in which individuals learn how to act and think. This social environment has been referred to as culture, and its individual embedment as "enculturation".[92]

Regarding the insights of evolutionary anthropology, it appears that culture is an intrinsic part of the individual, whose function is to shape their behaviour within society from generation to generation, in which the society is a reflection of the subject. Hence, as Becker has affirmed "*...Individuals have less control over their culture than over other social capital…culture is largely a 'given' to individuals throughout their*

[89] Gifford (n 87) 194–195
[90] Friedrich Hayek, *Law, Legislations and Liberty. A New Statement Of The Liberal Principles of Justice and Political Economy* (Routledge 1982) 71
[91] Goldschmidt (n 32) 180
[92] Ibid.

lifetimes".[93] North has equally stated that: "*culture, human evolution and economic development are closely interrelated*".[94]

The analysis of these theoretical insights offers different explanations for how culture is generated and diffused. While the explanations are diverse, the concurrent theme is that such a process is complex, deep-rooted, imposed, and makes individuals distinct. Accordingly, Richerson and Boyd have claimed that individuals from different cultures respond to the same incentive in different ways.[95] In the context of the value of adopting a specialised competition tribunal, it follows that the fundamental deduction is that culture should not be neglected when envisioning such adoption, and is important in terms of aligning the imported formal institution with the prevailing informal institutions to avoid rejection. After considering culture as a factor of successful transplantation, the next section explores the most common designs of institutional transplants.

1.1.5. DESIGN OF INSTITUTIONAL TRANSPLANTS

Two contrasting perspectives have been identified in the design of how transplantation will occur. The first is known as the "actors pulling in" argument, where the main attention is given to the political actors who will shape the conditions of the new institutions according to their preferences, and where the analysis of compatibility is less important.[96] The second is known as the "goodness of the fit" argument, where the

[93] Guiso, Sapienza and Zingales (n 88) 24
[94] Goldschmidt (n 32) 179
[95] Gifford (n 87) 193–194
[96] De Jong, Lalenis and Mamadouh (n 25) 184

precept is that only institutions compatible with the culture of the country to which they are being transferred can be transplanted.[97]

In addition, an important stream of research has explored three different types of transplantation design and has accordingly constructed a "stickiness" theory referring to degrees of success. The first type is foreign introduced exogenous (FEX), where the design is constructed and imposed by outsiders. The second is indigenously introduced endogenous (IEN), where the institutions emerge spontaneously grounded in *metis*. The third is the indigenously introduced exogenous (IEX), where the institutions are indigenous but externally introduced by a formal–local authority.[98]

Metis refers to local knowledge, gained through experience and practice, which is not written down (locals' norms or customs).[99] According to this approach, *metis* is the glue that gives institutions stickiness, so the highest level of success is more likely to be obtained when *metis* is incorporated into the design of the new institutions. In other words, neglecting the analysis of *metis* creates incongruities between new institutions and the local conditions.[100]

Similarly, another distinction has been made between two types of design. The "blueprint", where the design consists of transplanting institutions from more advanced economies regardless of the local conditions of the receiving country, and the "tacitness", in which tacit local knowledge is fundamental for the development of institutions, being

[97] Zweynert (n 75) 184
[98] Peter Boettke, Christopher Coyne and Peter Leeson, 'Institutional Stickiness and the New Development Economics' (2008) 67 American Journal of Economics and Sociology, 2, 332–335
[99] Ibid. 338
[100] Ibid. 338–340, 344; Couyoumdjian (n 16) 493

envisioned at a local level only.[101] It has been implied that these designs are unworkable separately, it being necessary for them to converge via harmonisation of local institutions with those from abroad.[102]

As the previous section has revealed, culture is a unique intrinsic factor of human development and social interaction and means that different societies respond differently to the same incentive. For this reason, in the context of designing courts that review the decisions of competition authorities, culture should not be ignored. Instead, designs whose consideration of local conditions, regardless of their labelling (*metis*, tacitness or indigenous), should be appraised when evaluating the viability of the transference of lessons related to the adoption of specialised competition tribunals in order to ensure a well-functioning judiciary.

Thus, the possibility to emulate, whether as an internal intention to catch-up with development or as an external imposition aimed at obtaining assistance, deserves meticulous scrutiny to avoid unexpected outcomes such as resistance, rejection, or conflicts between prevailing informal institutions and transported competition tribunals. The following recommendations are essential with a view to avoiding such pitfalls:

- The advance analysis of the compatibility between imported competition tribunals and local informal institutions.[103]
- The consideration of multiple court models instead of just one,[104] together with the use of positive symbols.[105]

[101] Dani Rodrik, 'Institutions for High-Quality Growth: What They Are and How to Acquire Them' (2000) National Bureau of Economic Research 7540, 15
[102] Ibid. 16.
[103] De Jong and Stoter (n 32) 321–322; Roland (n 32) 120

- The involvement of domestic policy actors with the new institutional transplant.[106]
- The recognition of personal, financial, and physical opportunities or limitations, as well as the knowledge of the specific regulations of the field.[107]

In addition, Rose has recommended the following style: i) clear and objective purposes; ii) a single goal; and iii) a simple design.[108]

1.1.6. CONCLUDING REMARKS

It has been observed that institutions have been created to bring order to society. In this way, the judiciary is an important institution designed to bring order at a different level, whose acceptance and legitimacy depends on its effectiveness. It has also been observed that the transplantation phenomenon is a complex one whose advisability and effectiveness remains debatable, but that despite the unsettledness, the use of transplants is very common, particularly among developing countries. The success or failure of transplants is difficult to predict, although it has been affirmed that the crux of the problem emerges when there is no compatibility between the prevailing informal institutions and the new formal transplanted institutions.

Seeking to understand why it is important to make formal and prevailing informal institutions compatible, it was necessary to understand how institutions change and at what pace. It was found that informal

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[104] Ibid. 320; De Jong and Stoter (n 32) 1066
[105] Ibid. 322
[106] De Jong and Stoter (n 32) 1066
[107] Ibid. 1065
[108] Rose (n 17) 10

institutions are generators of change, that they constitute an essential factor that helps embed formal institutions, and that formal institutions may change quickly, while institutional change remains slow. The study of the concept of culture was relevant to the underlying thesis by showing that if this factor were not included when contemplating the adoption of a specialised competition tribunal, the risks of rejection would be higher.

In terms of design of transplants, it has been seen that informal local institutions give stickiness to formal institutions, that it is more likely that a formal institution compatible with the culture of the recipient can be transplanted, and that, if close attention is not paid to local needs and efforts are not made to harmonise intended formal institutions with prevailing informal ones, the levels of legitimacy and effectiveness will be compromised, which could lead to the emergence of what has been referred to as "institutional traps".[109]

The purpose of this section has been to present the theoretical framework of transplants of institutions and so offer an overview of its complexity, and to grasp the core components that need to be deliberated to avoid rejection of a transplant. Embarking from this theoretical analysis, Section 1.2 aims to link the theoretical framework with the commonalities among Latin American countries in an attempt to: i) illuminate why Mexico constitutes a suitable case; and, ii) set the scene for Chapter 5 when a further and more detailed engagement, supported with empirical evidence, explores why the lessons offered by Mexico may fit the needs of the Latin American countries in search of practical solutions to similar issues.

[109] Goldschmidt and Zweynert (n 73) 907

1.2. LATIN AMERICAN COUNTRIES AND THEIR COMMONALITIES

Latin America as a region has shown certain features that help to elucidate why the majority of its countries have undeveloped competition regimes, why their economies are so challenging, and why it is questionable that general tribunals can outperform specialised competition tribunals. The first feature refers to the period from the 1930s to the 1970s when Latin American countries were characterised as having economies highly protected by interventionist governments.[110] This protectionist-orientated scheme brought as a result low competitive economies, so the region witnessed a radical decrease of exports,[111] and became the most unequal region in the world.[112]

The second feature is that in order to cover social and government expenditures Latin American countries were forced to severely raise the levels of foreign debt (it has been shown that as a region foreign debt moved from 0.19 in 1975 to 0.46 in 1982).[113] To maintain access to foreign credit and to sign trade agreements, during the 1990s Latin American countries changed their protectionist policies,[114] opened their markets, and started significant privatisation and deregulation processes.[115]

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[110] Malcolm Coate, Rene Bustamante and A E Rodriguez, 'Antitrust in Latin America: Regulating Government And Business' (1992) 24 Inter-American Law Review, 40–44; Luis Marin-Tobar, 'Competition Regulation In Ecuador' (2013) 9 (3) Journal Of Competition Law & Economics 772; Dina Waked, 'Competition Law In The Developing World: The Why And How Of Adoption And Its Implications For International Competition Law' (2008) Global Antitrust Review 78

[111] Edwards (n 1) 5

[112] Ibid. 1

[113] Ibid. 4

[114] Manuel Agosin, 'Productive Development Policies in Latin America: Past and Present' (2013) University of Chile, Working Paper 382, 13–15; Waked (n 6) 1–2.

[115] UNCTAD, 'Competition and Concentration in Latin American Emerging Economies' <http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Latin-American-Emerging-

The third feature is that, notwithstanding almost a century of gradual proclamation of free trade principles or competition provisions in penal codes, civil codes or commercial legislations in Latin America, the enforcement levels were weak.[116] This situation derived from the dominance of vested interests, the capture of the authorities responsible for enforcement, lack of enforcement powers, the ineffectiveness of the competition provisions,[117] the lack of a culture of competition, and the underestimation of the consequences of violating competition provisions.[118] It is during the 1990s that the region witnessed a significant growth in enactment or amendment of competition regimes, as well as the creation of competition agencies.[119]

The fourth feature is that, institutionally, Latin American countries have been characterised as showing presidential supremacy whereby the amount of concentrated power allows the executive to exert dominance over the judiciary, so reducing its independence.[120] Furnish clearly illustrated this institutional weakness in 2000, stating: "*...by Mexican tradition sitting presidents have dismissed sitting judges whenever it suits their purpose to do so…*".[121]

Economies.aspx> accessed 5 March 2018; Daron Acemoglu and James Robinson, 'The Role of Institutions in Growth and Development' (2010) The World Bank, Working Paper No. 10, 146

[116] OECD (n 6) 2–3

[117] A E Rodriguez and Mark Williams, 'The Effectiveness of Proposed Antitrust Programs for Developing Countries' (1994) 19 North Carolina Journal of International Law and Commercial Regulation 2, 222, 223

[118] Abel Mateus, 'What Competition Law Regime?' in D. Daniel Sokol, Thomas K. Cheng, and Ioannis Llanos (eds), in *Competition and Development* (Stanford Law Books 2013) 133; Gal (n 2) 24.

[119] Diego Petrecolla, Esteban Greco, Carlos Romero and Juan Vila-Martinez, 'Economic Structure And Competition Policy Application in Latin American Countries' in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox and David Gerber (eds), in *The Economic Characteristics of Developing Jurisdictions – Their Implications for Competition Law* (Edward Elgar publishing 2015) 94

[120] Salzman and Ramsey (n 4) 78–79

[121] Dale Furnish, 'Judicial Review in Mexico' (2000) Southwestern Journal of Law and Trade in the Americas, 239

In many Latin American countries the dominance of the executive has been so strong that the functioning of the judiciary has been diminished, and members have acted cautiously to avoid risks.[122] As a result, the Latin American judiciaries have been described as weak, ineffective, dependent, powerless, and incompetent.[123] They have been considered as among the most inefficient, ineffective, and corrupt in the world.[124] Such a judiciary gives weight to the argument for institutional reform where independent and knowledgeable judges are required.

The combination of these four main features reveals unique conditions that help foresee the difficulty faced by Latin American competition agencies and general tribunals when dealing with antitrust cases after decades of stagnation, and institutional weakness. The high number of Latin American countries with emerging competition agencies and new competition regimes aggravates the situation.

Section 1.2 centres the analysis on when Latin American countries adopted their competition regimes, when their competition agencies were created, which countries have specialised competition tribunals, and their levels of enforcement. Similarly, it focuses on the levels of a culture of competition by looking at the following indicators: levels of income, poverty rates, global competitiveness report, barriers to entry, barriers to import competition, extent of the informal economy, and logistics infrastructure.

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[122] Howard Wiarda and Harvey Kline, *Latin American Politics And Development* (Westview Press 2000) 64; Gretchen Helmke and Jeffrey Staton, 'A Theory of Litigation, Judicial Decisions, and Interbranch Conflict' in G. Helmke and J. Rios-Figueroa (eds), in *The Puzzling Judicial Politics Of Latin America* (Cambridge University Press 2011) 307, 308, 309

[123] Gretchen Helmke and Julio Rios-Figueroa, *Courts In Latin America* (Cambridge University Press 2011) 1

[124] Staats, Bowler and Hiskey (n 3) 78

As a caveat at this juncture, it is necessary to mention that the number of indicators that can be explored to find differences and similarities among countries or group of countries is considerable. Therefore, a limited number of indicators that may have an impact on the development and application of competition regimes has been chosen. Equally, a limited number of 17 Latin American countries will be examined, since with those 17 most of the information was available. The exclusion of some other Latin American countries is due to lack of information. Nevertheless, the number of countries under examination is representative, so the findings will not be compromised.

1.2.1. COMPETITION REGIMES, COMPETITION AUTHORITIES AND ENFORCEMENT IN LATIN AMERICA

a. Adoption or modernisation of competition regimes across Latin America

Table 1.1 shows that during the 1990s Latin America undertook a vigorous process of adoption of competition policies or modernisation of obsolete statutes that were rarely enforced.[125] A vast percentage (94%) of the Latin American countries adopted or modernised their competition regimes after 1991.

The countries are listed alphabetically, with an indication of the year in which a competition regime was adopted; and the year or years when a competition regime was amended.
* This symbol indicates that statutes were adopted earlier, but they were hardly enforced.

[125] Petrecolla, Greco, Romero and Vila-Martinez (n 119) 94

Table 1.1: Adoption or modernisation of competition regimes across Latin America

Country	Year when competition regime was enacted	Year(s) when competition regime was amended
Argentina	1997*	1999, 2001
Bolivia	2008	
Brazil	1994*	2000, 2007, 2011
Chile	1959	1999, 2003, 2009
Colombia	1992*	
Costa Rica	1995	2010, 2012
Dominican Rep.	2008	
Ecuador	2011	
El Salvador	2006	2007, 2008
Honduras	2006	2007
Mexico	1993*	1998, 2011
Nicaragua	2007	
Panama	1996	1997, 2007, 2008
Paraguay	2013	
Peru	1991	1996, 2008

Uruguay	2007	
Venezuela	1991	1993, 1996, 1997, 1999, 2000, 2006

The data indicates that Argentina in 1997, Brazil in 1994, Colombia in 1992, and Mexico in 1993 modernised their competition regimes, while 12 countries adopted them for the first time. Among the countries that adopted their competition regimes after 1991, it has been established that four were adopted between 1991 and 2000, six between 2001 and 2010, and two after 2011.[126]

The main conclusion to be drawn from this analysis is that there is a common trend among the majority of Latin American countries consisting of late adoption and late modernisation processes of their competition regimes. Considering that six countries adopted competition regimes between 2001 and 2010, and two more after 2011, totalling eight Latin American countries, it could be said that the development of competition law has recently started in the region. According to a study undertaken by the International Competition Network (hereafter ICN),[127] competition culture is perceived as weaker in developing economies where competition regulation has only been recently adopted. Therefore, the main inference that this data provides is that in the majority of Latin American countries the levels of a culture of competition are weak, which

[126] <https://developingworldantitrust.com/2015/06/29/the-adoption-of-modern-competition-policies-in-latin-america-part-i-north-and-central-america-and-the-caribbean/> accessed 16 May 2018; <https://developingworldantitrust.com/2015/07/07/the-adoption-of-modern-competition-policies-in-latin-america-part-ii-south-america/> accessed 16 May 2018

[127] ICN (n 20) 3

for the purpose of this research project suggests the need for strong institutions to alleviate such issues, among them the judiciary.

b. Creation of competition agencies across Latin America

The analysis of the data relating to the time when competition agencies across Latin America were created, contained in Table 1.2, reveals two facts. The first is that the majority of the competition agencies in Latin America (82.3%) were created after 1991. The information is presented as follows: five agencies created between 1991 and 2000, six between 2001 and 2010, and three after 2011. The rest correspond to the first competition agency created in Latin America: Brazil in 1962, followed by Chile in 1963, and then Argentina in 1980.[128]

The second is that in six cases the year in which competition agencies were created does not match the year in which their operations started, due to issues of resource provision or administrative processes. In Argentina the competition agency was created in 1980 but started functioning in 1996,[129] in Dominican Republic the competition authority was created in 2011 but operations started later, in 2017, in El Salvador in 2005 but functioning in 2006, in Nicaragua in 2006 but operations started in 2009, in Panama the agency started operation one year after its creation, and in Paraguay its creation was in 2013 but operations started in 2016.

[128] <https://developingworldantitrust.com/2015/06/29/the-adoption-of-modern-competition-policies-in-latin-america-part-i-north-and-central-america-and-the-caribbean/> accessed 16 May 2018; <https://developingworldantitrust.com/2015/07/07/the-adoption-of-modern-competition-policies-in-latin-america-part-ii-south-america/> accessed 16 May 2018

[129] Petrecolla, Greco, Romero and Vila-Martinez (n 119) 94

The main inference from the collected data is that in general, Latin America is characterised as having a high number of competition agencies created during the 2000s and 2010s. An important feature is that the time of their creation does not necessarily correspond with the time of functioning, with relevant cases like Argentina where the competition agency operated 16 years after being created.

Additionally, it has been established that the majority of the Latin American countries investigated, with the exception of Chile and Panama, have adopted administrative systems of enforcement that follow administrative procedures for the analysis of anticompetitive conducts, and which possess both investigative and adjudicative powers.[130] De Leon argues that infant agencies perform under a learning process environment that affects the regular pattern of decision-making by which judicial review ensures consistency, and that considering their significant powers (as prosecutor and jury), it is essential to preserve effective judicial control over them to safeguard general principles of policy enforcement.[131]

Therefore, the findings presented in this section aim to demonstrate that the majority of Latin American countries have recently created or strengthened their competition agencies, and that their institutional design responds to administrative government units with both investigative and decision-making powers. This circumstance predicts, on the one hand, low levels of a culture of competition considering that the study presented by the ICN[132] stated that higher levels are expected in countries with

[130] Ignacio de Leon, Latin American Competition Law and Policy – A Policy in Search of Identity (Kluwer Law International 2001) 206
[131] Ibid. 215
[132] ICN (n 20) 3

experienced competition agencies, and on the other, infant agencies with significant powers such as selecting the case, investigating, making the final decision, and imposing significant sanctions, so necessitating proper judicial review. Hence, knowledgeable judges reviewing antitrust cases would be desirable to support the functioning of emerging competition agencies, to help increase the levels of competition culture, and to ensure a proper scrutiny of the decisions adopted by these agencies. Table 1.2 presents the data.

Table 1.2 contains an alphabetical list of the countries, with an indication of the year in which their competition agencies were created.

* This symbol indicates that the competition agency did not start functioning the same year it was created.

( ) The year in brackets indicates when functions started.

Table 1.2: Creation of competition agencies across Latin America

Country	**Year when competition agency was created**
Argentina	1980* (1996)
Bolivia	2009
Brazil	1962
Chile	1963
Colombia	2009

Costa Rica	1994
Dominican Rep.	2011* (2017)
Ecuador	2011
El Salvador	2005* (2006)
Honduras	2006
Mexico	1993
Nicaragua	2006* (2009)
Panama	1996* (1997)
Paraguay	2013* (2016)
Peru	1992
Uruguay	2009
Venezuela	1992

c. Latin American countries with specialised competition tribunals

The number of Latin American countries that have adopted specialised competition tribunals is small. At the moment, just Chile, Peru and Mexico possess this type of judiciary. In 2003, a specialised court was created in Chile – the *Tribunal de Defensa de la Libre Competencia* (TDLC) – whose final decisions are reviewed by a non-specialised tribunal within the Supreme Court.[133]

[133] OECD, 'Country Studies. Chile – Accession Report on Competition Law and Policy. 2010' 11, 34–35 <http://www.oecd.org/daf/competition/sectors/47950954.pdf> accessed 19 March 2018

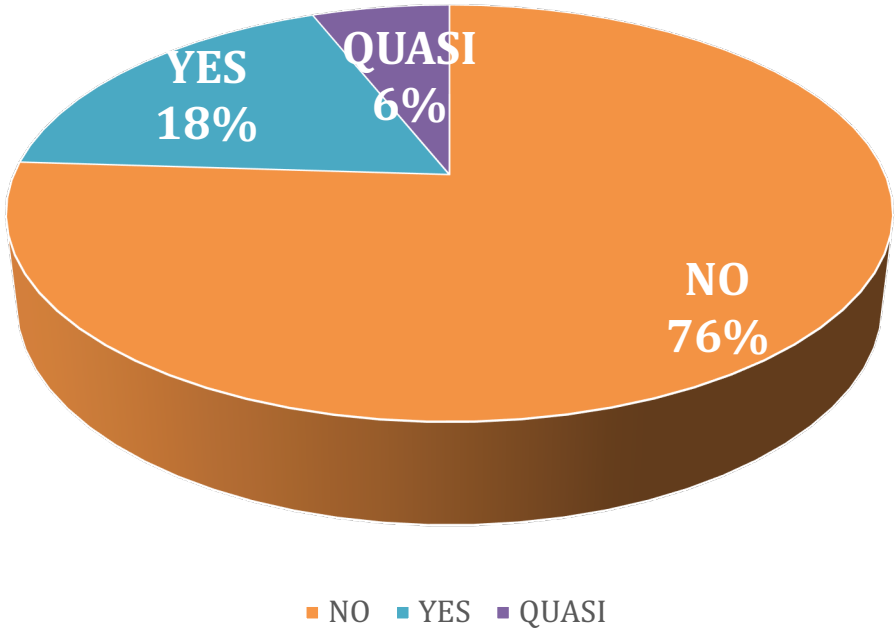
In 1992, a specialised competition tribunal was created in Peru known as INDECOPI. It translates as the National Institute for the Defence of Competition and Protection of Intellectual Property, and is responsible for solving in the second and last instance the appeals against the decisions ending the first instance of competition cases.[134] With regard to Argentina, the country presents a particular judicial review system where all federal appeal courts have jurisdiction, but the Federal Civil and Commercial Court of Appeals in Buenos Aires resolves the majority of the antitrust cases, which is why it is considered quasi-specialised.[135]

Chapter 4 of this thesis will present a detailed examination of the specialised competition tribunal in Mexico, whose adoption aimed to alleviate low levels of efficiency and quality in the review process due to lack of competition knowledge amid the judiciary – the reason why this specialised tribunal has been chosen as a case study. Elsewhere, the judicial review in the majority of the Latin American countries has been assigned to general jurisdiction tribunals. Figure 1.1 and its accompanying table present the data.

Figure 1.1: Existence of a specialised competition tribunal

[134] INDECOPI, <https://www.indecopi.gob.pe/web/indecopi_ingles/division-with-jurisdiction-over-defense-of-competition> accessed 19 March 2018

[135] OECD, 'Country Studies, Argentina – Peer Review of Competition Law and Policy' (2006) 34–35 <http://www.oecd.org/daf/competition/Argentina-CompetitionLawPolicy.pdf> accessed 19 March 2018



Countries	Existence of specialised competition tribunal
Argentina	Quasi
Bolivia	NO
Brazil	NO
Colombia	NO
Costa Rica	NO
Dominican Rep.	NO
Ecuador	NO
El Salvador	NO
Honduras	NO
Nicaragua	NO
Panama	NO
Paraguay	NO
Uruguay	NO
Venezuela	NO
Chile	YES
Mexico	YES
Peru	YES

d. Levels of enforcement

The relevant literature has recognised that sanctions have two important functions: the first is to serve as compensatory mechanism, and the second is to serve as deterrent mechanism.[136] It has also been stated that the courts facilitate the effectiveness of the sanctions by assessing the appropriate penalty, and by imposing high fines, which makes the enforcement strict.[137] At the same time, De Leon has noted that the judiciary enhances competition policy enforcement by effectively controlling the enforcement decisions made by the competition authorities.[138] Additionally, the OECD has recognised that a proper judicial review underlines the legitimacy of the authorities' decisions, as well as enhances respect for enforcement efforts.[139]

Likewise, the competition authorities will align their investigations according to the standards of proof set by the courts, whereby the possibility to envisage a sanction will dictate the investigative strategy and the procedures, which could translate into effectiveness. Having established the important role played by the judiciary in the enforcement of competition law, we now examine some data with the aim of provoking some inferences in relation to the levels of enforcement in Latin America.

One of the most striking differences between developed and developing countries is that enforcement levels in the latter are lower than in the former.[140] As noted in the section above, diverse issues such as new or

[136] OECD (n 19) 25
[137] Ibid. 26
[138] De Leon (n 130) 215
[139] OECD (n 43) 3
[140] A E Rodriguez and Ashok Menon, 'The Causes of Competition Agency Ineffectiveness in Developing Countries' (2016) 79 Law And Contemporary Problems 39; Vivek Ghosal, 'Resource Constraints and Competition Law Enforcement' in D. Daniel Sokol, Thomas K. Cheng and Ioannis Llanos (eds), *Competition Law and Development* (Stanford University Press 2013) 111–112

weak competition agencies implementing new or modified competition regimes, scarcity of resources, high levels of informal economy, and low levels of a culture of competition affect the implementation of competition law in developing countries.[141]

The literature has identified more challenges affecting the effectiveness of competition law, among them the discrepancy in terms of policy goals between the competition regime and the policymakers' aspirations.[142] This situation was recognised by the World Bank when they diagnosed that government policies were facilitators of cartels in developing countries.[143]

As illustrated in Section 1.2, although during the 1990s an unprecedented number of competition regimes were enacted or modified, as well as a significant number of competition agencies created or strengthened,[144] the levels of enforcement were weak.[145] Due to the specific socio-economic conditions shown by developing countries, combined with the fact that many of their adopted antitrust laws did not capture their local needs, the assumption is that developing countries do not enforce their competition laws.[146] Such an assumption remains valid despite the different attempts to provide empirical evidence measuring their effectiveness,[147] which have been challenged by insufficient and inconsistent data.[148]

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[141] About this particular topic see Umut Aydin and Tim Buthe, 'Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (2016) 79 Law And Contemporary Problems 11–12.
[142] Rodriguez and Menon (n 140) 41; Eleanor Fox and Deborah Healey, 'When the State Harms Competition: The Role for Competition Law' (2014) 79 Antitrust Law Journal 769
[143] Graciela Miralles, 'Cartel Exemptions in Developing Countries: Recent Work from the World Bank Group' 7– 8 <https://www.competitionpolicyinternational.com/assets/Uploads/CartelSeptember2.pdf> accessed 19 February 2019
[144] Petrecolla, Greco, Romero and Vila-Martinez (n 119) 94
[145] OECD (n 6) 2–3
[146] Waked (n 6) 1
[147] Rodriguez and Menon (n 140) 64–66; Waked (n 6) 15; On the description of the different studies see Serdar Dalkir, 'A Quantitative Evaluation of Effectiveness and Efficacy of Competition Policy

Effectiveness has been measured by looking at, for instance, budgets and staffing levels of antitrust authorities. In particular, Dina Waked's study using these proxies has found that most developing countries are potentially capable of enforcing their antitrust laws, but factors such as economic development, openness to trade, and corruption are significant variables that impact their possible levels of enforcement.[149]

However, the use of these proxies, it has been alleged, is not accurate,[150] as they do not allow comparisons,[151] and do not cover a sufficiently large set of countries or sufficiently long periods of time.[152] As an illustration, Ghosal's study found that advanced economies operate more efficiently with much lower numbers of staff than developing countries, which are burdened by less efficient bureaucratic processes,[153] meaning that high numbers of staff do not necessarily signify efficiency.

The use of surveys has also been disregarded, due to the biases that the answers may entail, and the subjectivity used to provide enforcement rankings, such as the Anti-monopoly performance index published by the World Economic Forum's Global Competitiveness Report.[154] This evaluation reveals the problems inherent in measuring the levels of

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Across Countries' in 2 Politics triumphs Economics? Political Economy and The Implementation of Competition Law And Economic Regulation In Developing Countries (CUTS International 2009) 230–238.

[148] Ghosal (n 140) 92–93

[149] Waked (n 6) 1.

[150] It has been indicated that good funding and staffing do not guarantee automatic success, see Dalkir (n 147) 238–244.

[151] Rodriguez and Menon (n 140) 66

[152] Frank Kronthaler, 'Effectiveness of Competition Law: A Panel Data Analysis' (2007) Institut Fur Wirtschaftsforschung Halle 7, 9

[153] Ghosal (n 140) 111–113

[154] Rodriguez and Menon (n 140) 66

enforcement of antitrust laws and the scarcity of empirical evidence about them.

In any case, the assumption that enforcement activity in developing countries is lower than in developed ones seems valid considering the specific socio-economic conditions shown by Latin American countries described above, and given that the majority of the countries in the region have new or weak competition regimes and agencies. This assumption is relevant for the purpose of this thesis because it could be suggested that the judiciary may be interfering with enforcement activities, as was the case in Mexico. Under such circumstances, the adoption of a specialised competition tribunal seems advisable.

1.2.2. LEVELS OF COMPETITION CULTURE

Competition culture has been defined as a varied set of indicators that determine individual and/or group behaviour in the field of market competition and competition enforcement, such as knowledge, experience and perception.[155] Likewise, it has been found that competition culture was perceived as stronger in countries with specialist competition tribunals.[156] Theoretically, it has also been proposed that competition creates wealth and reduces poverty,[157] and that well-functioning courts have a positive impact on the efficient operation of the markets and economic growth.[158] In this regard, Kovacic has claimed that judges with knowledge of the principles of market economics and competition law

[155] ICN (n 20) 8
[156] Ibid. 2, 3
[157] OECD, 'Why is Competition Important for Growth and Poverty Reduction?' (2008) 3
[158] OECD (n 43) 2

enhance the awareness of competition policy of the country in question.[159]

In light of the above theoretical framework, and considering that the purpose of this chapter is to find some commonalities among Latin American countries, this research project will examine, among a wide range of possible indicators, the following seven that can be associated with wealth, efficient markets and economic growth: a) income classification; b) poverty; c) economic growth and prosperity; d) barriers to entry; e) barriers to import; f) informal economy; and g) infrastructure. A detailed examination of these indicators and the respective deductions in relation to levels of competition culture based on each factor is subsequently presented.

The main proposed inference is that low levels of a culture of competition afflict countries with low incomes, high levels of poverty, low economic growth, high barriers to entry and to import, and poor infrastructures. Such inferences emerge from a suggested relationship between these indicators and governments not being aware of the ways in which competition is being harmed, or perhaps unsure about how to identify where barriers to competition exist.[160] The analysis is also used to predict that poorly functioning judiciaries are impacting the efficiency of the markets and economic growth, which in turn is a sign of low levels of a culture of competition, and that, in this sense, the adoption of specialised competition tribunals might boost them.

[159] William Kovacic, 'Getting Started: Creating New Competition Policy Institutions in Transition Economies' (1997) Brooklyn Journal of International Law 32, 440
[160] Ibid.

Therefore, if similarities are found in this sense, then some Latin American countries afflicted by low levels of a culture of competition could replicate the lessons offered by the Mexican case. The deductions will also help elaborate on how such weaknesses, combined with delays and low levels of competition knowledge amid the judiciary, make it difficult to expect competition authorities alone to sufficiently drive competition culture.

The assumption, then, is that an efficient and knowledgeable judiciary may help boost the levels of competition culture, at least amid the judiciary, and eventually will reach consumers, business leaders or government officials by ensuring that decisions adopted by competition authorities are adequate. In such cases, it is plausible to recommend the adoption of a specialised competition tribunal.

a. Income classification

The purpose of analysing the income classification of the Latin American countries under examination is to predict their levels of competition culture, expecting good levels in high-income economies and weaker levels in economies with lower incomes.[161] This prediction emerges by inferring that in high-income countries the markets are efficient and competitive, which could be linked to governments being aware of the importance of regulations that facilitate such scenarios and having eliminated barriers that were impeding them. Likewise, considering that it has been indicated that high-income countries have more efficient judiciaries,[162] and tend to have relatively strong institutions,[163] this

[161] ICN (n 20) 3
[162] Dam (n 40) 102–103

analysis is used to make indirect inferences in relation to the levels of a culture of competition and the existence of specialist competition tribunals.[164]

Income classification is a tool used by the World Bank to group countries according to their gross national inputs per capita. For the 2018 fiscal year, according to the World Bank Atlas method, low-income economies are defined as those with a GNI per capita of $1,005 or less in 2016; lower middle-income economies are those with a GNI per capita of between $1,006 and $3,955; upper middle-income economies are those with a GNI per capita of between $3,956 and $12,235; and high-income economies are those with a GNI per capita of $12,236 or more.[165]

The examination of the data establishes that Bolivia, El Salvador, Honduras and Nicaragua (23.5%) have been classified as lower-middle income, while the majority of the Latin American countries (64.7%) have been classified as upper-middle-income, and, just Chile and Uruguay (11.76%) have been classified as high-income. Figure 1.2 shows that the majority of the Latin American countries are characterised as having upper-middle incomes, and a good number by having lower-middle incomes.

As has been indicated, low levels of a culture of competition are expected in low-income Latin American countries, which tend to be afflicted by weak institutions.[166] Chile is one of only two high-income economies in

[163] Arthur Denzau, Shereef Ellaboudy and Mahmoud Khalil, 'Institutions and Economic Development in the OECD' (2007) 12 International Research Journal of Finance and Economics, 72
[164] ICN (n 20) 3, 4
[165] <https://blogs.worldbank.org/opendata/new-country-classifications-income-level-2017-2018> accessed 17 May 2018
[166] Peerenboom (n 47) 9

Latin America and is one of only three Latin American countries to have a specialised competition tribunal, as well as the oldest competition agency in Latin America, and the second oldest competition regime in the region. The case of Chile reinforces the assumption that the existence of a judiciary with specialists in competition law enhances the levels of a culture of competition,[167] and that well-functioning courts have a positive impact on the efficient operation of the markets and economic growth.[168] Figure 1.2 presents the data.

Figure 1.2: Income classification

Source: The World Bank <https://blogs.worldbank.org/opendata/new-country-classifications-income-level-2017-2018 > accessed 17 May 2018

b. Poverty

The goal of this section is to demonstrate that poverty is a common issue affecting the majority of Latin American countries, being indirectly

[167] ICN (n 20) 3, 4
[168] OECD (n 43) 2

associated with low levels of a culture of competition. This link emerges from the assumption that poverty exists partly because governments do not have the ability to recognise the importance of competition principles or the need to remove barriers that harm competition. Similarly, under the assumption that competition reduces prices,[169] it could be argued that if citizens use their resources more efficiently then competition is an instrument capable of combating poverty. The analysis of this factor is relevant for this thesis considering that the combination of scant attention to competition rules and weak institutions reveals the need for knowledgeable judges who cooperate with the implementation of economic policies by properly controlling the decisions adopted by the competition agencies and the prices specially paid for basic goods or services.[170]

For this purpose, the first step is to define poverty, then to provide a general diagnosis of the poverty picture in the region, and finally to provide country statistics from which some inferences will emerge. The analysis will be narrow, as a more in-depth study goes beyond the scope of this research project.

Poverty is a multidimensional concept. The variety of definitions that can be found shows the nuances that the concept itself and its measurement may offer.[171] Departing from the basic definition given by the World

[169] Michal Gal, 'The Social Contract at the Basis of Competition Law: Should we Recalibrate Competition Law to Limit Inequality?' in Ioannis Lianos and Damien Gerard (eds), in *Competition Policy: Between Equity and Efficiency* (Cambridge University Press 2017) 4 <https://ssrn.com/abstract=3014354> accessed 4 December 2019

[170] OECD (n 19) 25

[171] Caterina Ruggeri, Ruhi Saith, Ruhi and Frances Stewart, 'Does it Matter that we do not Agree on the Definition of Poverty? A Comparison of Four Approaches' (2010) 31:3 Oxford Development Studies, 243-274; David Piachaud, 'Problems in the Definition and Measurement of Poverty' (1987) 16 Journal of Social Policy 2 Cambridge University Press, 147–164

Bank, according to which poverty is a deprivation of wellbeing,[172] three strands are commonly used to understand and measure the concept.[173]

One strand refers to monetary resources, aiming to establish whether individuals can meet their necessities by comparing levels of income. A second strand measures specific indicators like health or education whose gauge goes beyond monetary considerations, by, for instance, establishing levels of literacy. A third strand discusses how capable an individual is to function in society, so aspects such as empowerment, inclusion, or exercise of rights are measured.

At a regional level, inequality is the most important factor. In terms of income distribution, Latin America is the most unequal region in the world. Disparities are even deeper when aspects such as gender, age, geographic area, ethnicity, etc. are considered. It has been claimed that these disparities constitute the biggest difficulty for Latin American countries in the fight against poverty.[174]

Also at a regional level, statistics have shown fluctuating rates of poverty, passing from 48.4% in 1990 to 43.9% in 1999, with a major improvement in 2008 (33.5%).[175] The statistics also indicate that by 2014 Latin America registered 167 million poor people, of which 71 million were in

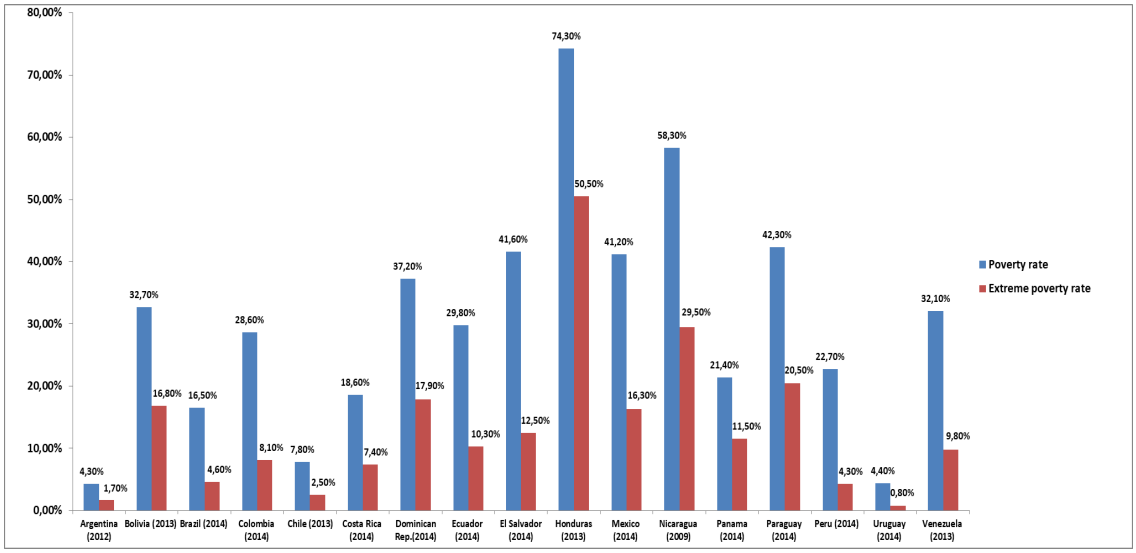
[172] World Bank, 'World Development Report 2000/2001: Attacking Poverty' (2000) Washington, D. C, <https://openknowledge.worldbank.org/handle/10986/11856> accessed 9 June 2018
[173] Jonathan Haughton and Shahidur Khandker, 'What Is Poverty and Why Measure It? Handbook on Poverty and Inequality' (2009) The World Bank, 2–3 <http://siteresources.worldbank.org/INTPA/Resources/429966-1259774805724/Poverty_Inequality_Handbook_FrontMatter.pdf > accessed 10 June 2018
[174] United Nations, ECLAC, 'Inclusive Social Development – The next generation of policies to overcome poverty and to reduce inequality in Latin America and the Caribbean' (2016) 23–32 <https://repositorio.cepal.org/bitstream/handle/11362/39101/4/S1600098_en.pdf> accessed 22 February 2018
[175] Ibid. 16

extreme poverty.[176] The numbers suggest that even though poverty levels have been reduced in the region, the amount of people living in poverty is still significant, meaning that considerable efforts are required to tackle this issue.

Figure 1.3 presents an examination of country statistics, with the following findings: 1) The countries with the lowest poverty levels are Argentina, Chile and Uruguay (less than 10%). 2) The levels shown by Brazil, Costa Rica, Panama and Peru do not exceed 30%. 3) Almost half of the Latin American countries have reached poverty levels above 30%. 4) Honduras reached the highest level (poverty rate 74.3%, extreme poverty rate 50.5%), followed by Nicaragua (58.3%) and El Salvador (41.5%). This data corroborates that poverty constitutes one of the biggest challenges faced by the region, and reveals low levels of a culture of competition. Therefore, the adoption of a specialised competition tribunal may contribute to the reduction of such unawareness of competition rules and potentially alleviate levels of poverty at least to a small degree by contributing to the development of financial and credit markets and facilitating firm growth.[177]

[176] Ibid.
[177] OECD (n 43) 2

Figure 1.3: Levels of poverty



Source: CEPAL (the variables measured included housing, basic services, education, employment and social protection, and life standards) <https://repositorio.cepal.org/bitstream/handle/11362/39101/4/S1600098_en.pdf> accessed 22 February 2018

c. Economic growth and prosperity

The World Economic Forum's Global Competitiveness Index is a useful tool that assesses 137 economies around the world. It identifies the levels of economic growth and prosperity of the evaluated countries, a factor that could also be used to envision their levels of competition culture.[178] Table 1.3 presents the final ranking obtained by the listed countries in an attempt to show at a glance how these economies performed, with a score of 1 indicating the best and 137 the worst. Countries with good scores are expected to have high levels of a culture of competition, while those with poor scores are expected to have low levels.

[178] World Economic Forum, 'Global Competitiveness Index 2017 – 2018' <http://reports.weforum.org/global-competitiveness-index-2017-2018/countryeconomy-profiles/#economy=VEN> accessed 19 February 2018

The first pillar is “Institutions”. This pillar evaluates the following indicators: A. Public Institutions (1 Property rights, 2 Ethics and corruption, 3 Undue influence, 4 Public sector performance, 5 Security), and B. Private Institutions (1 Corporate ethics, 2 Accountability). As institutions are a key factor for economic development, given that efficient and credible bodies attract and attain investment, this ranking is presented in an attempt to explore how institutions are perceived in the Latin American countries listed.

The table also shows the “most problematic factor for doing business”, with the aim of finding possible commonalities among the Latin American countries under scrutiny.

Finally, the table contains information about the 6th pillar, “Goods market efficiency”, where the following topics are evaluated: A. Competition (1 Domestic competition, 2 Foreign competition), and B. Quality of demand conditions. This pillar is being evaluated as it is strongly related to the scope of this research project.

Table 1.3: Economic growth and prosperity

Country	**Ranking**	**1st Pillar: Institutions**	**Most problematic factor for doing business**	**6th Pillar: Goods market efficiency**
Argentina	92	113	Inflation	133
Bolivia	N/A	N/A	N/A	N/A
Brazil	80	109	Tax rates	122

Chile	33	35	Restrictive labour regulations	39
Colombia	66	117	Corruption	102
Costa Rica	47	48	Inefficient government bureaucracy	63
Dominican Rep.	104	129	Corruption	115
Ecuador	97	128	Policy Instability	128
El Salvador	109	133	Crime and theft *	109
Honduras	96	120	Tax rates	98
Mexico	51	123	Corruption	70
Nicaragua	93	115	Inefficient government bureaucracy *	117
Panama	50	74	Inefficient government bureaucracy *	41
Paraguay	112	131	Corruption	86
Peru	72	116	Corruption	75
Uruguay	76	34	Tax rates	77
Venezuela	127	137	Inflation	137

Source: Global Competitiveness Index 2017.

*Indicates that corruption is the second most problematic factor for doing business.

N/A: Due to lack of information, the ranking does not assess Bolivia.

In relation to the final scores, the evaluation of the data leads to the following inferences. The first is that just three Latin American countries – Chile, Costa Rica, and Panama were ranked between 1 and 50. The second is that nine Latin American countries occupy the places between 51 and 100. And the last inference is that four Latin American countries are positioned at the bottom of the ranking, between 101 and 137.

As a region, the majority of the Latin American countries are ranked between 51 and 137, Mexico at rank 51, denoting a modest economic growth or prosperity and thereby modest levels of competition culture. The best-positioned country is Chile, at 33, and the worst is Venezuela, at

127. None of the Latin American countries are in the top ten. One Latin American country, Venezuela, is in the bottom ten.

In terms of 1st Pillar "Institutions" scores, once again just three Latin American countries were ranked between 1 and 50. Just one was placed 51 to 100. And the rest were ranked between 100 and 137. The best placed was Chile (35/137), and the worst Venezuela (137/137).

Regarding the most problematic factor for doing business, the data indicates that the following five Latin American countries: Colombia, Dominican Republic, Mexico, Paraguay, and Peru are most affected by corruption, followed by tax rates and inefficient government bureaucracy, and inflation.

Finally, the 6th pillar, "Goods market efficiency", presents the following deductions. Two Latin American countries: Chile and Panama are positioned between places 1 and 50, six: Costa Rica, Honduras, Mexico, Paraguay, Peru, and Uruguay between places 51 and 10, and, eight: Argentina, Brazil, Colombia, Dominican Republic, Ecuador, El Salvador, Nicaragua, and Venezuela between places 101 and 137. Overall, half of the Latin American countries under examination are characterised as having inefficient markets.

To conclude, Chile is the Latin American country best positioned in terms of economic growth and prosperity, including institutions and goods market efficiency pillars. Apart from this country, the majority of the Latin American countries under examination had poor scores. Mexico in particular was placed 51 in the final score, but 70 for goods market efficiency, 123 for institutions, and with corruption as the most

problematic factor for doing business, suggesting low levels of a culture of competition.

The lack of credible institutions requires special attention, as 12 out of 17 Latin American countries were ranked from 101 to 137 for this pillar. Also, half of the Latin American countries need to work on improving the efficiency of their markets, as at the moment they are ranked towards the bottom of the list. Finally, corruption seems to be a common hurdle among Latin American countries, given that in five Latin American countries it constitutes the most problematic factor for doing business, and in three others it is the second-most (it has been indicated that corruption is ineffectively combated in three-quarters of the middle-income countries around the world).[179]

It could be argued that the adoption of specialised competition tribunals might serve as an antidote to corruption by making the judiciary more credible,[180] and more efficient. This argument is in line with a previous study whose findings have suggested that well-functioning judicial systems serve as a deterrent to corruption or, in other words, that inefficient judicial systems serve as an incentive to corrupt deals.[181] Considering the significant levels of corruption in Latin America, it may be illusory to expect that the adoption of a specialised competition tribunal could alleviate systemic corruption. Nonetheless, it could be proposed that the expertise of knowledgeable judges may reduce opportunities for corruption if the control of the decisions adopted by competition agencies, whose powers are significant, is in-depth.

[179] Peerenboom (n 47) 10
[180] Randall Peerenboom has informed that judicial corruption has damaged public trust in the courts; see (n 47) 10.
[181] Giuseppe Albanese and Marco Sorge, 'The Role of the Judiciary in the Public Decision-Making Process' (2012) 24 Economics & Politics 3

d. Barriers to entry

The ease or difficulty of entering markets is an important indicator of levels of competition culture. It determines the incentives that potential competitors may have to invest in in order to participate or expand in such markets.[182] It has been asserted that for markets to remain competitive there should be no unnecessary barriers, and that these barriers are often the result of government regulations, which may disincentive business.[183] In this sense, it could be proposed that policy-based barriers to entry or to import are a reflection of a weak culture of competition. This circumstance supports the adoption of a specialised competition tribunal, since the courts through their review decisions facilitate the efficient operation of the markets[184] and boost competition culture within the judiciary[185]. If judges lack specialist competition knowledge and are overworked then they may not be in the best position to fulfil such tasks.

The "ease of doing business" index provided by the World Bank is used to analyse this indicator. This ranking evaluates 190 countries, where rank number 1 is the best, and rank number 190 is the worst. The ranking is based on an evaluation of ten topics, taking the average score to give a final ranking.[186]

[182] Gal (n 169) 3
[183] OECD (n 157) 4, 6, 7
[184] OECD (n 43) 2
[185] ICN (n 20) 14
[186] The World Bank, Doing Business <http://www.doingbusiness.org/rankings?region=oecd-high-income> accessed 27 February 2018

Table 1.4 presents the “ease of doing business” rank that the country has achieved, and gives details about two of the ten sub-indices: 1) the number of days required to start and operate a local firm; and, 2) the number or days required to obtain construction permits. As was indicated earlier, the ranking evaluates ten topics, but considering that the purpose of this analysis is to provide a general picture, the eight remaining topics are unobserved on this occasion.

The evaluation of the data suggests that doing business in Latin America is not easy. A detailed consideration of the rankings occupied by the Latin American countries under examination indicates that just one country has been ranked 1 to 50, while eight have been ranked 51 to 100, and the other eight have been ranked 101 to 190.

Table 1.4: Barriers to entry

Country	"Ease of Doing Business" rank	Starting a business (days required)	Obtaining a construction permit (days required)
Argentina	117	25	30
Bolivia	152	29	26
Brazil	125	28	29
Colombia	59	13	9
Chile	55	22	7
Costa Rica	61	19	6
Dominican Rep.	99	17	5
Ecuador	118	27	16
El Salvador	73	22	23
Honduras	115	24	17
Mexico	49	10	11
Nicaragua	131	20	31
Panama	79	2	12
Paraguay	108	23	7
Peru	58	16	4
Uruguay	94	4	27
Venezuela	188	32	24

Source: The World Bank, Doing Business reports.

e. Barriers to import

One more important area that provides evidence about the functioning and characteristics of markets is the import of goods, which reveals the likelihood of market penetration and rivalry, in other words, levels of a culture of competition. This indicator is examined using the information contained in the World Bank's "Doing Business: Trading across Borders" rank. This ranking evaluates 190 countries (number 1 being the best, and number 190 the worst). For the purpose of this study, four indicators have been included: 1) time to import (hours); 2) cost to import (USD); 3) time to import: documentary compliance (hours); and, 4) cost to import: documentary compliance (USD).[187]

A broad examination of the collected data allows the following observations. In relation to ranking: 1) just El Salvador is ranked between 1 and 50; 2) eight countries are ranked between 51 and 100; 3) eight other countries are ranked between 101 and 190; 4) El Salvador has the best ranking (43) and Venezuela the worst (187).

In relation to the hours required to import, the inferences are: 1) Dominican Republic, Ecuador, Panama, and Uruguay register up to 24 hours; 2) El Salvador, Mexico, and Paraguay register up to 48 hours; and 3) ten countries register more than 48 hours. The country with the quickest process is Uruguay, with up to six hours, while Venezuela is the slowest, with 240 hours.

[187] The World Bank, Doing Business <http://www.doingbusiness.org/Methodology/Trading-Across-Borders> accessed 28 February 2018

In terms of cost to import (USD), the variance is significant across the countries. For instance, while Ecuador shows the lowest cost ($128), Venezuela shows the highest ($1500). Regarding the time to import: documentary compliance (hours), the readings are: 1) in six countries up to 24 hours are required to comply with import documentation; 2) in four countries up to 48 hours; and, 3) in seven countries more than 48 hours are required. The country that presents the quickest process is Panama, with up to six hours, while the slowest process is seen in Venezuela, with up to 1090 hours.

To sum up, a good percentage of the countries have much work to do. El Salvador shows the best ranking (number 43), and Venezuela the worst (number 187). In terms of hours to import, the majority of the countries require more than 48 hours to complete the process. In general, the import of goods process in Latin American countries could be easier if the number of hours required and the cost were reduced.

Such limited awareness of the importance of having smooth import transactions may be an indication of low levels of a culture of competition that can be interpreted as conscious barriers to avoid competition or unfamiliarity with how efficient import transactions can improve it. Table 1.5 presents the data.

Table 1.5: Barriers to import

Country	**"Trading across Borders" rank**	**Time to import (hours)**	**Cost to import (USD)**	**Time to import: Documentary compliance (hours)**	**Cost to import: Documentary compliance (USD)**
Argentina	116	60	1200	192	120
Bolivia	89	114	315	72	30
Brazil	139	63.1	969.6	48	106.9
Chile	68	54	290	36	50
Colombia	125	112	545	64	50
Costa Rica	73	80	420	26	75
Dominican Rep.	59	24	579	14	40
Ecuador	102	24	140	24	250
El Salvador	43	36	128	13	67
Honduras	115	96	483	72	70
Mexico	63	44	450	17.6	100
Nicaragua	74	72	400	16	86
Panama	54	24	490	6	50
Paraguay	120	48	500	36	135
Peru	92	72	583	72	80
Uruguay	151	6	375	72	285
Venezuela	187	240	1500	1090	400

Source: The World Bank, Doing Business reports.

f. Informal economy

It has been predicted that large businesses are expected to have higher levels of a culture of competition, and that there is a direct link between a good understanding of competition law and company size.[188] The argument goes that high levels of informality denote low levels of a culture of competition, and depicts challengeable markets where disputes perhaps become more difficult to resolve if the judiciary lacks knowledge of competition and small enterprises do not have the resources to consult competition law specialists.[189] It has also been indicated that when onerous regulations or anticompetitive behaviour are present, a large informal sector emerges, creating barriers to entry to formal markets as a result.[190]

Street transactions are an illustration of this informality, where market players are possibly uninformed about competition law but rather guided by informal institutions like culture, moral norms or local traditions. These may not be aligned with formal institutions like competition agencies or courts applying a competition regime. This scenario becomes worse if such formal institutions are weak. The example of street transactions shows why informal economies represent a challenge to the implementation of competition law and illustrates their significance in terms of levels of a culture of competition.

It is essential to point out that due to the elusiveness of the informality that characterises these economies, data collection is complex. For this

[188] ICN (n 20) 19
[189] Ibid. 22
[190] Daniel Sokol, Thomas Cheng, and Ioannis Llanos, 'The Experience in Developing Countries' in *Competition and Development: The Power of Competitive Markets* (International Development Research Centre 2008) 37

reason, this research project uses the figures from 2013 as the most recent, where information from some countries is missing. Despite the challenges, the gathered data is sufficient to enable some inferences to be made.

Before the collected data is analysed, an explanation of the meaning of informal economy is provided. The definition of informal economy has progressed over recent decades, and with it its measurement.[191] During the 1970s and 1980s the concept referred to economic activities characterised by: 1) small-scale operation; 2) use of out-dated technology; 3) family ownership; and 4) low capacity for accumulation.[192]

Then, in 1993, a new definition gave prominence to aspects such as organisation, administration, and technology used to produce units (employment in the informal sector).[193] Ten years later a new criterion was added: the characteristics of the jobs of workers without social and labour rights became part of the definition (employment part of the informal sector).[194] The next part will examine the statistics.

By 2013, the Latin American country with the lowest percentage of informal economy was Costa Rica with 30.7%, followed by Uruguay (33.1%), Brazil (36.4%) and Panama (40.4%). Argentina and Ecuador reached percentages close to 50%. By contrast, in the following countries

[191] ILO, Latin American and the Caribbean, 'Thematic Labor Overview, Transition to Formality in Latin America and the Caribbean, Evolution and Characteristics of Informal Employment' (2014) 9 <http://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_314469.pdf> accessed 1 March 2018
[192] William Haller and Alejandro Portes, 'The Informal Economy' in Neil J. Smelser and Richard Swedberg (eds), in *The Handbook of Economic Sociology* (Princeton University Press 2005) 404
[193] ILO (n 191)10
[194] Ibid.

the percentage of informal economy exceeds 50% of market size: Colombia, Dominican Republic, El Salvador, Mexico, Paraguay, Peru, and Honduras.[195]

The most important conclusion to draw here is that the majority of Latin American countries, Mexico included, greatly depend on the incomes generated by informal economies. The situation is critical even in the Latin American countries where the informal economy represents only around 30% of the market, not to mention the case of Honduras whose percentage is almost three times the size of the market (72.8%), a significant indicator of low levels of a culture of competition. These findings generate insights about how specialised competition tribunals may be in a better position to deal with such critical markets, partly facilitating enforcement by presenting the imposition of strict sanctions to market players, partly establishing when competition rules should apply within such informality. Table 1.6 below presents the data.

Table 1.6: Informal economy

Country	**Informal employment in the informal sector (2013)**	**Informal employment in the formal sector (2013)**	**Informal employment in domestic work (2013)**	**Total (2013)**
Argentina	30.2%	10.8%	5.7%	46.7%
Bolivia	N/A	N/A	N/A	N/A
Brazil	21.6%	9.6%	5.2%	36.4%
Chile	N/A	N/A	N/A	N/A

[195] ILO (n 191) 53–54

Colombia	45.3%	5.7%	3.4%	54.4%
Costa Rica	20.0%	4.6%	6.1%	30.7%
Dominican Rep.	33.0%	11.5%	6.7%	51.2%
Ecuador	32.8%	13.7%	2.8%	49.3%
El Salvador	51.3%	9.1%	5.2%	65.6%
Honduras	58.0%	11.1%	3.7%	72.8%
Mexico	34.5%	14.2%	5.0%	53.7%
Nicaragua	N/A	N/A	N/A	N/A
Panama	25.8%	10.8%	3.8%	40.4%
Paraguay	32.9%	21.8%	9.1%	63.8%
Peru	40.1%	20.9%	3.1%	64.1%
Uruguay	27.4%	2.5%	3.2%	33.1%
Venezuela	N/A	N/A	N/A	N/A

Source: International Labor Organization, Thematic Labor Overview, Transition to Formality in Latin America and the Caribbean.

g. Infrastructure

In countries with good transport, electricity, and telephony infrastructure economies are competitive and markets are efficient. This was illustrated by an OECD study, which showed that the price and quality of transport services can have a significant impact on the competitiveness of markets.[196] Thus, poor infrastructures might indicate that policymakers lack sufficient competition knowledge, and are therefore failing to

[196] OECD (n 157) 7

identify barriers that should be removed to induce more effective competition.[197] Besides attracting more investors, logistics based on good infrastructures also provide lower prices as a result of lower costs. This is not the common situation in the majority of the Latin American countries, though, which is a clear indication of low levels of a culture of competition. For this reason, this factor is examined.

To provide some evidence, the Global Competitiveness Index is reviewed again, this time focusing on the second pillar "Infrastructure". This pillar evaluates the following indicators: 1 Transport infrastructure; and 2 Electricity and telephony infrastructure. Table 1.7 presents the overall score, and the scores given to the respective indicators.

To be able to understand the data it is important to bear in mind that the Global Competitiveness Index assesses 137 economies around the world, number 1 being the best and number 137 the worst. So, the study of the data provides the following deductions: in relation to infrastructure final score, just Chile, Panama, and Uruguay are ranked from 1 to 50, the majority are ranked from 51 to 100, and four countries are ranked from 101 to 137. The best-positioned country is Panama, ranked 37, and the worst is Venezuela, ranked 127.[198]

Regarding transport infrastructure scores, the data indicates that four countries are ranked from 1 to 50, a good percentage is located from places 51 to 100, and three countries are positioned from places 101 to 137. The country with the best score is Panama in rank 32, and the worst is Venezuela in rank 129.

[197] Ibid. 8.
[198] World Economic Forum (n 178)

In terms of electricity and telephony infrastructure, the data shows that three countries are positioned from 1 to 50, nine countries are located from 51 to 100, and four countries are ranked from 101 to 137. The best-located country is Uruguay in place 16, and the worst is Dominican Republic in place 117.

The main inferences that can be made after examining the data in more detail are: 1) the majority of the Latin American countries have modest infrastructure scores, being positioned from 51 to 100. 2) At the bottom of the ranking Latin American countries are always present. 3) Not even one Latin American country has been placed in the top ten of the list. 4) One Latin American country is in the bottom ten of the list. 5) Big efforts are required to move positions within the ranking.

The above analytical framework contributes to this research by providing an understanding of how important it is that countries recognise the importance of enjoying competitive markets, since such awareness is reflected in good infrastructures that facilitate the trade. For this reason the conclusion that derives from this analysis is that the presence of poor infrastructures reveals modest levels of a culture of competition in the majority of Latin American countries.

Table 1.7: Infrastructure

Country	**2nd pillar: Infrastructure**	**Transport Infrastructure**	**Electricity and telephony infrastructure**

Argentina	81	78	79
Bolivia	N/A	N/A	N/A
Brazil	73	65	72
Chile	41	47	43
Colombia	87	98	76
Costa Rica	65	103	37
Dominican Rep.	101	53	117
Ecuador	72	48	88
El Salvador	77	93	65
Honduras	104	80	105
Mexico	62	38	84
Nicaragua	92	95	89
Panama	37	32	53
Paraguay	118	124	113
Peru	86	97	75
Uruguay	45	84	16
Venezuela	127	129	109

Source: Global Competitiveness Index 2017
N/A: Information about Bolivia is not available

1.2.3. THE JUDICIARIES IN LATIN AMERICA

This section is dedicated to presenting statistics about the confidence shown by Latin American citizens towards their judiciaries. The main

finding is that there is sense of distrust,[199] which could be due to delays, levels of corruption or poor-quality decisions. If this is the case in the judicial review process of antitrust cases, and if the final arbiters in antitrust cases are not credible, it could be the result of ineffective judicial control of the decisions adopted by competition authorities, leading to a weakness in the implementation of competition law.

Such weakness emerges from the interplay between the functioning of the competition authorities and the courts. In this regard, it has been recognised that the role played by the judiciary in the implementation of competition law through the judicial review is significant due to the knock-on effects on the competition authorities' decisions.[200] As an illustration, it could be mentioned that a credible judicial review provides an opportunity to challenge and correct erroneous decisions, ensures the protection of the parties' individual and procedural rights, underpins the legitimacy of authority decisions, and enhances the overall standing of and respect for enforcement efforts.[201]

De Leon has also asserted that there is a correlation between competition authorities and the judiciary in the enforcement activities, and that such enforcement is strengthened by a capable, technical and proper judicial review of the decisions adopted by competition authorities.[202] Thus, in light of the significant impact that the review process has over the decisions of the authority, a review that does not operate quickly, that does not fully assess the correctness of decisions (including all facts and evidence), that prefers solving the case based on the procedural issues

[199] De Leon (n 130) 219
[200] OECD (n 43) 2, 3
[201] Ibid. 2–5
[202] De Leon (n 130) 219–220

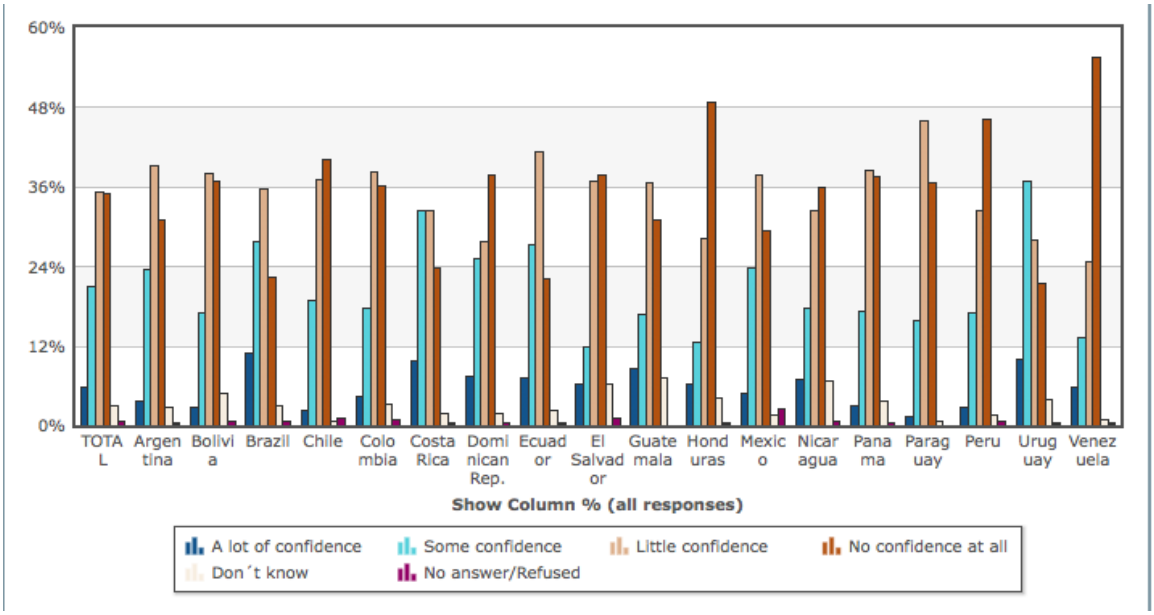
rather than on the merits of the case, or that does not assess rigorously the economic theories involved or the application of the competition principles, may interfere with the functioning of the competition authority and broadly with the checks and balances task exercised through judicial review.

In relation to the statistics, Latinobarometro revealed that 34.9% of people interviewed indicated that they did not have confidence at all in the judiciary, while just 5.7% had a lot. The countries with the most precarious levels of confidence in the judiciary were Venezuela (55.5%) and Honduras (48.7%). The Latin American country with the highest level of confidence was Brazil with 10.9%.[203]

In terms of institutions, Latinobarometro revealed that in 2016 the institution with the highest levels of credibility in Latin America was the church, with 38.7%, whereas the institution with lowest level of credibility was the political parties, with 49.7%, followed by the judiciary with 34.9%.[204] Figures 1.4 and 1.5 summarise the information.

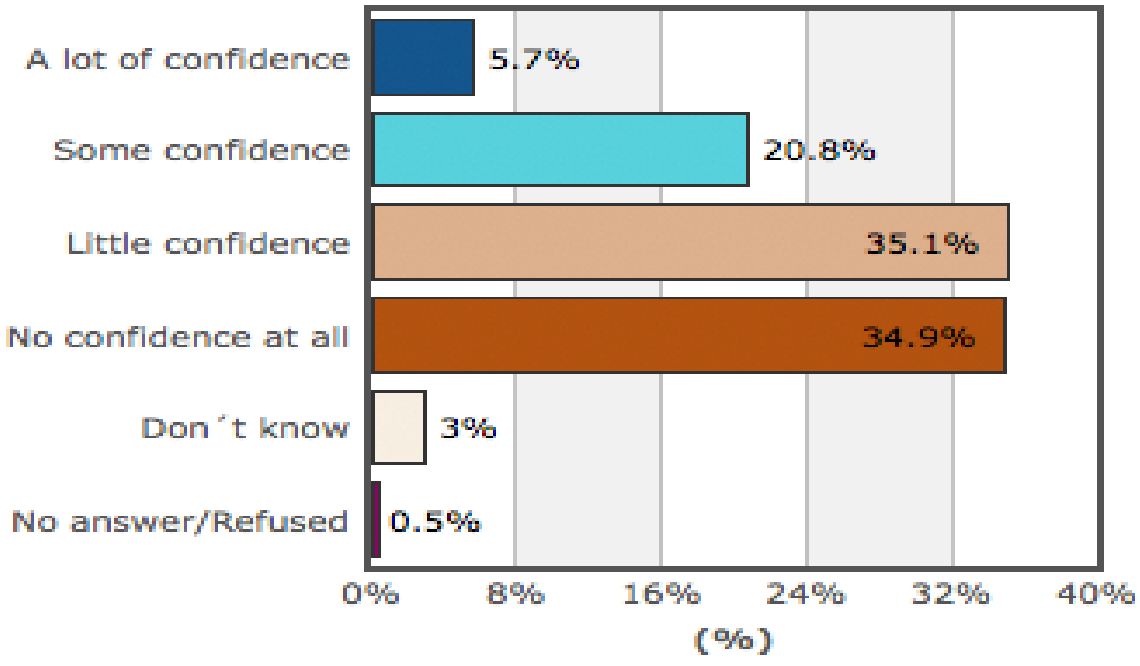
[203] Latinobarometro (2016) <http://www.latinobarometro.org/latOnline.jsp> accessed 14 October 2018
[204] Ibid.

Figure 1.4: Confidence in the judiciary



Source: Latinobarometro 2016

Figure 1.5: Overall confidence in the Latin American judiciaries



Source: Latinobarometro 2016

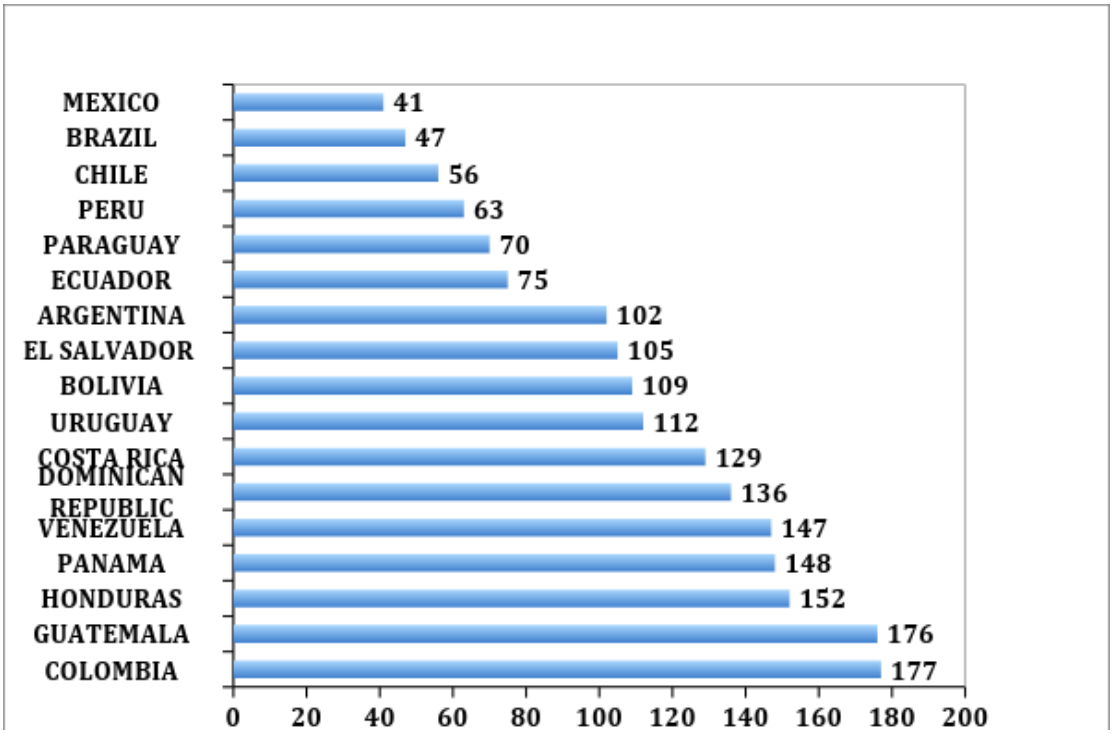
One further source of information that tracks the levels of satisfaction with the services provided by the Latin American court system is the

World Bank's "Doing Business" indicator of contract enforcement. This measures the time and cost needed to resolve a commercial dispute before first-instance courts. According to the 2018 report, while it takes 767 days on average to enforce a standard commercial contract in Latin America, in Europe and Central Asia it takes 489. The Latin American country with the best ranking (41) and the lowest number of days to enforce is Mexico (341).[205]

The majority of Latin American countries are far from well placed, with rankings are follows: Argentina (102), Bolivia (109), Colombia (177), Costa Rica (129), Dominican Republic (136), El Salvador (105), Guatemala (176), Honduras (152), Panama (148), Uruguay (112), and Venezuela (147). Such positions reveal high levels of dissatisfaction with the performance of the court system in the region. Figure 1.6 summarises the data.

[205] The World Bank, Doing Business report 2018 <http://www.doingbusiness.org/en/rankings?region=latin-america-and-caribbean> accessed 23 October 2018

Figure 1.6: Doing Business 2018 – contract enforcement



This section has elaborated on the lack of reliability afflicting the judiciaries in Latin America. This is a common theme in the region where dissatisfaction may be related to issues such as delays, quality of decisions, or corruption. The presence of these pitfalls suggests that potentially the competition regimes in Latin American countries are facing enforcement issues, and that their judiciaries may be impeding a better development of competition law, as well as improved functioning of the competition agencies. If this is the case, then the adoption of a specialised competition tribunal could offer a good solution.

One more important feature that needs to be outlined is that Mexico shows the best ranking among the Latin American countries under examination. The adoption of a specialised competition tribunal may have positively influenced how the courts are perceived. In this sense, if some Latin American countries are searching for a practical solution to

this common issue then they should consider the lessons offered by Mexico.

1.2.4 CONCLUDING REMARKS

Section 1.2 has aimed to explore whether Latin American countries have commonalities that would enable the outcomes of this research project to be applicable to some of them. The overview of different indicators offers good evidence for a wide range of similarities. It should be stressed that the analysis has been primarily concerned with aspects that impact the functioning and the development of competition regimes, as well as some factors indicative of levels of a culture of competition.

Likewise, bearing in mind time limitations, the scope of the analysis of these aspects has been broad and restricted, so the findings presented here do not imply that more commonalities are present, or that there are areas of difference. A summary of the findings is presented next.

The first finding that emerges from the analysis is that the adoption or modernisation of competition regimes, as well as the creation of competition agencies, accompanied the privatisation and deregulation process begun in Latin America during the 1990s. The data shows that 12 out of 17 Latin American countries under scrutiny adopted or modernised their competition regimes after 1991, and 14 of them created their competition agencies after 1991. This gives a picture of a region characterised as having emerging competition agencies, and competition regimes recently adopted or modernised.

The second finding in the light of this research project is that, if the judiciaries are inefficient, and judicial reviews are based mainly on procedural issues or the sanctions imposed by the competition agencies are revoked without a proper scrutiny, then the development of their competition regimes and the attainment of good levels of enforcement will be even more challenging. In this sense, the role of the review courts is relevant whether reinforcing or impeding the good functioning of the competition field.

The third finding is that just a minority of Latin American countries (Chile, Peru, and Mexico) have specialised competition tribunals, while the majority count on general jurisdiction tribunals responsible for the judicial review of antitrust cases.

The fourth finding is that the majority of Latin American countries belong to the group of upper-middle income countries, while four of them belong to the group of lower-middle income, and just two have high levels of income (Chile and Uruguay). It could be inferred that there is a possible connection between the existence of a specialised competition tribunal in Chile since 2003 and the high levels of income presented by this country. One more inference that could be drawn is that in the upper-middle income and lower-income countries inefficient judiciaries, weak institutions, and low levels of competition culture are expected.

The fifth finding is that the majority of Latin American countries are characterised as having high levels of poverty, which translates into low levels of a culture of competition. According to the analysed data, just three countries have low levels of poverty (below 10%), while the rest

show significantly high levels. This situation constitutes one of the biggest challenges faced by the region.

The sixth finding relates to economic growth and development. Using the Global Competitiveness Index as a gauge, the results indicate that the majority of the Latin American countries held modest positions, which signifies modest levels of competition culture. The Latin American country in the best position is Chile (place 33), and in the worst is Venezuela (place 127). None of the Latin American countries are in the top ten of the ranking.

The same situation is observed when analysing the specific pillars "institutions" and "goods market efficiency", where the rankings occupied by the majority of the Latin American countries under examination are far from good. Likewise, corruption constitutes the most problematic factor for doing business in Latin American countries.

The seventh finding refers to the "ease of doing business" rank, whose analysis shows that it is not easy to do business in the majority of Latin American countries. This situation suggests that there is not a solid culture of competition, and that probably the judiciaries do not function properly. Another relevant finding is that the majority of Latin American countries critically depend on the incomes generated by informal economies, denoting low levels of a culture of competition. The Latin American country with the lowest percentage of informal economy was still over 30%, with some cases where the percentage reached almost 75% of total size of the economy.

The final finding is that in terms of infrastructure the situation is similar to that of economic growth and development, that is, the majority of the Latin American countries ranked poorly, with transport, electricity and telephony infrastructures needing improvement, depicting once again low levels of a culture of competition. The findings of low levels of a culture of competition assist in the thesis narrative by illustrating that the existence of such factors predicts governmental policies introduced with an unawareness of the importance of competition, perhaps being also impacted by poorly functioning judiciaries. This circumstance, combined with new competition regimes and weak competition authorities embedded with strong powers, suggests that credible and effective courts will help boost the levels of competition culture through proper judicial review.

Section 1.2.3 has also established that the judiciaries in Latin America are perceived as not trustworthy. The fact that this institution lacks credibility indicates that one of the elements that compose the competition landscape is lacking. Such deficiency implies that the final authority in antitrust cases, instead of being the most knowledgeable and the most credible, may represent an impediment to the implementation of competition law. If this is the case, then the lessons offered by Mexico may help address such a common issue.

To summarise, the most relevant commonalities between Mexico and some other Latin American countries are the existence of weak or emerging competition agencies, the application of new or modernised competition regimes in countries with low levels of a culture of competition, and judiciaries lacking credibility, making of Mexico a relevant case study.

1.3 CONCLUSIONS

The first purpose of this chapter (Section 1.1) was to provide a conceptual framework of the transplants phenomenon, an analysis that was required to understand the complexity of the process, to anticipate possible difficulties, and to establish some recommendations that would allow the best outcomes when emulating lessons.

The second purpose of this chapter (Section 1.2) was to present some commonalities among Latin American countries with a view to establishing why Mexico is a relevant case, and to link the theoretical framework provided in Section 1.1 with the established commonalities detailed in Section 1.2. So, if a Latin American country has similar issues and is searching for practical solutions from outside, then the lessons provided by the Mexican case suitably adapted may offer a practical example.

Among the illustrated similarities, is has been established that the majority of the Latin American countries have weak or emerging competition agencies, newly adopted or modernised competition regimes, low levels of enforcement, and unreliable judiciaries, aspects also shown by the Mexican case, which makes the appraisal appropriate.

Under such circumstances, it seems that the adoption of specialised competition tribunals in some Latin American countries is advisable. Nevertheless, if these countries do intend to emulate the type of judiciary adopted in Mexico, it is indispensable to evaluate thoroughly local needs, prevailing informal institutions, and local opportunities as well as local

limitations, in order to encourage participation from local political actors and to ensure good levels of acceptance.

CHAPTER 2

Specialisation: scarcity of evidence, competition law, developing countries, and international organisations

INTRODUCTION

Chapter 1 of this thesis placed the emphasis on the analysis of the phenomenon of *transplant of institutions* by deconstructing the guiding principles of institutions, transplants, institutional change, culture, and design of institutional transplants from different theoretical perspectives. At the same time, it focused on establishing some commonalities among Latin American countries, as a way to link the theoretical framework with the aim of establishing why Mexico is a relevant case, and with a view to informing broader implications of the findings (Chapter 5).

The emphasis of this thesis now shifts from an exclusive focus on the *transplant of institutions* phenomenon, and commonalities among Latin American countries, to a narrower focus on judicial specialisation. The first part of the chapter (Section 2.1) describes the scarcity of empirical evidence about the benefits (efficiency, quality, uniformity) and drawbacks (loss of independence) that are prominently assigned to specialised tribunals. The purpose of surveying such scarcity of empirical evidence is to endorse the pertinence of this research project, since the latter aims to contribute to the research area by providing some empirical evidence.

Considering that this research project assesses the performance of the specialised competition tribunal in Mexico as a way to provide some

empirical evidence about the benefits and drawbacks that this type of judiciary provides, Section 2.2 focuses the analysis on the following five indicators identified by Stephen Legomsky for the purpose of establishing whether specialisation is suitable for competition law: i) complexity; ii) room for discretion; iii) dynamism; iv) high volume of cases; and v) speed. The key finding here is the significant number of arguments both in favour and against specialisation in competition law particularly reference the complexity factor, which i) illustrates the unsettledness of the topic, and ii) reveals the necessity of offering some progress on such analysis. These two points respond to the second goal of this chapter.

Section 2.3 examines the arguments in favour and against the adoption of specialised competition courts in developing countries. The examination of the theoretical perspectives that scholars have offered in this regard will inform the analysis about the appropriateness of these types of tribunals for Latin American countries in Chapter 5. Subsequently, Section 2.4 explores the role played by international organisations in persuading Latin American countries to adopt specialised competition tribunals. This will allow us to evaluate the performance of the Mexican tribunal in a wider context, and to establish whether its adoption responded to international pressure, which might have compromised the success of the transplantation process, as was previously explored in the theoretical framework of transplant of institutions in Chapter 1.

The structure of the chapter is designed as follows. The analysis starts with the stated benefits and drawbacks of specialised tribunals with a view to demonstrating how divided the scholars upon this matter (Section 2.1). Section 2.2 then continues with an examination aimed at determining whether competition law is suitable for specialisation

according to the model created by Stephen Legomsky. Following this analysis, Section 2.3 explores different scholarly opinions about the suitability of specialised competition tribunals in developing countries.

Finally, Section 2.4 focuses on the role of international organisations in the implementation of specialised competition tribunals in Latin America. Ultimately, this chapter aims to piece together the various theoretical accounts of the suitability of specialised competition tribunals for developing countries. Various international organisations appear to advocate for such transplants, yet often without offering empirical evidence to support their suitability for developing countries.

2.1. SPECIALISATION: BENEFITS AND DRAWBACKS

For the purposes of this research project, specialisation of the judiciary should be understood as when a judge is focused on a narrow case area, with limited and exclusive jurisdiction on a regular basis. Such specialisation operates at the trial or appellate level, and is assigned to generalist judges or to experts, or a mixture of both.[206]

It has been claimed that specialisation increases productivity. Adam Smith emphasised how the division of labour and the repetition of the same activity increased the productivity of the person, of the machinery, and of the factories.[207] This division of labour has been applied in different areas or professions,[208] including the judiciary, where the popularity of specialised tribunals has led to the creation of more courts

[206] Richard Revesz, 'Specialized Courts and the Administrative Law Making System' (1990) 138 University of Pennsylvania Law Review 4, 1125–1130
[207] Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Cosimo Classics 1901) 6–19
[208] Deborah Rhode, 'The Profession and Its Discontents' (2000) 61 Ohio State Law Journal 2

of this type in the last few decades.[209] The inference stemming from Smith's theory is that if a judge deals with the same type of disputes regularly, the time and quality of the decision-making process improves.

Yet despite this increase in specialised tribunals, and their expected continued increase, there is no evidence for their benefits. As Lawrence Baum expresses, it seems that the growth of specialised tribunals "...*has been a product of inadvertence rather than design*..."[210]. Likewise, different studies attempting to establish whether specialised tribunals out-perform generalist ones have failed to give conclusive answers, with the explicit recognition of how difficult the matter is.[211]

Such weakness supports the pertinence of this research project and its examination of whether the specialised competition tribunal in Mexico has been beneficial. This section offers an in-depth analysis of the theoretical framework surrounding the following apparent benefits of specialised tribunals, namely efficiency, quality, and uniformity. It also covers the main identified drawback assigned to this type of judiciary, namely the loss of independence.

2.1.1. BENEFITS

The most common benefits attributed to specialisation are: efficiency, quality, and uniformity. Lawrence Baum has identified these as the three

[209] Heike Gramckow and Barry Walsh, 'Developing Specialized Court Services, International Experiences and Lessons Learned' (2013) The World Bank, Legal Vice Presidency, Justice & Development, Working Paper Series, 24, 2; Alan Uzelac, 'Mixed Blessing of Judicial Specialisation: The Devil Is in the Detail' (2014) II Russian Law Journal 4, 147
[210] Baum (n 7) 146
[211] Chad Oldfather, 'Judging, Expertise and the Rule of Law' (2012) 89 Washington University Law Review 892, 899–900; Ellen Jordan, 'Specialized Courts: A Choice?' (1981) 76 Northwestern University Law Review 5, 784

common virtues of specialisation, and at the same time has also recognised the need for empirical evidence validating them, which is why this research project focuses on testing the veracity of these apparent benefits.[212] This section offers an analysis of each one, and presents the debates that have emerged in relation to them.

a. Efficiency

It has been indicated that when a judge deals with the same types of cases over a considerable period of time, s/he is able to make quicker decisions. Some scholars have also recognised that especially when hearing complex cases, such a judge would have the advantage of better and more quickly understanding complex matters or technical debates, which would avoid the lengthy process that this would otherwise entail.[213]

It is assumed also that a good understanding of the matter provides judges with the advantage of formulating different methods of settlement at an earlier stage.[214] Unah has affirmed that specialised judges develop the ability to predict problems and formulate solutions with greater alacrity.[215] Such ability translates into cost savings for the parties and for the countries, as a specialised judge will not need so long to grasp the legal framework.[216]

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[212] Baum (n 7) 33

[213] Douglas Ginsburg and Joshua Wright, 'Antitrust Courts: Specialists vs Generalists' (2013) 36 Fordham International Law Journal 4, 793–795; Baum (n 7) 32–33; Jessica Vapnek, 'Cost-Saving Measures For The Judiciary' (2013) International Journal For Court Administration, 6

[214] Daniel Savrin, 'Specialized Antitrust Courts: A Practitioner's Observations' in *Annual Proceedings of the Fordham Competition Law Institute: international antitrust law & policy: 2012* (Juris Publishing 2013) 117–118

[215] Isaac Unah, 'Specialized Courts of Appeals' Review of Bureaucratic Actions and the Politics of Protectionism' (1997) 50 Political Research Quarterly 4, 858

[216] Markus Zimmer, 'Overview of Specialized Courts' (2009) International Journal for Court Administration, 1–2

In relation to competition law, Roth has asserted that specialisation is likely to make the hearings more efficient as the judges are familiar with the field, giving the example of private antitrust actions in England, where the hearings conducted by ordinary courts unfamiliar with competition law are expected to take longer and be more expensive in consequence.[217] Likewise, a study on judges' training needs in the field of European Competition Law reported a strong connection between the degree of specialisation of courts and the level of knowledge of their judges.[218]

In this regard, the World Bank assessed the performance of the specialised commercial tribunal in Tanzania by investigating whether such a tribunal was more efficient than the general division of the high court. The results showed that the commercial court was more efficient, but the report is not representative; while the specialised court attended 231 new cases per year, the general division of the high court received almost 400 new cases per year, plus the 1,100 pending.[219] The previous results reinforce the claim that more categorical studies comparing generalists with specialised judges in terms of efficiency are needed,[220] and justify one of the purposes of this research project, that is, measuring the efficiency of the recently adopted Mexican specialised competition tribunal against the previous generalist one.

b. Quality

[217] Sir Peter Roth, *'Specialized Antitrust Courts'* (2013) Fordham Competition Law Institute, 105
[218] European Commission, *'Study on Judges' Training Needs in the Field of European Competition Law – Final Report'* (2016) 59
[219] David Finnegan, 'Judicial Reform and Commercial Justice: The Experience of Tanzania's Commercial Court' (2005) Background Paper Prepared for the World Bank Development Report, 6.
[220] Ginsburg and Wright (n 213) 794.

A judge who is familiar with a particular field is expected to improve the quality of the decision-making. This improvement derives from being able to more easily identify the matter of the issue, and distinguish more quickly the assertiveness of the arguments presented by the parties or the witnesses. Such a judge will also produce a decision that correctly applies the law through use of all the information that has been collected with his/her expertise.

Such expertise will lead to more accurate decisions, particularly in complex cases where a good understanding of the unique difficulties of the case is required.[221] Similarly, the Competition Authority of the United Kingdom has reported, after the adoption of a specialised competition tribunal in that country, that one of the main advantages of judicial specialisation in competition law is that expertise and experience enable judges to understand expert evidence and argument, so reaching authoritative conclusions.[222]

To measure the quality of decision-making is difficult. So difficult that it has been stated that this task is simply not possible.[223] For those who have decided to embark upon this mission, the evaluation of factors such as appeals, reversal, and citation rates have been their most common tools. However, the use of these factors is questionable, mainly because the idea of what represents a good judge is very disputable, but most importantly, because key concepts such as what represents a good decision remain undefined.[224]

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[221] Edward Cheng, 'The Myth of the Generalist Judge: An Empirical Study of Opinion Specialization in the Federal Courts of Appeals' (2007) Brooklyn Law Legal Studies, Research Papers, Working Paper Series, Research Paper 81, 4–5; Savrin (n 214) 116–117; Zimmer (n 216) 2.
[222] OECD (n 43) 4
[223] David Levi and Mitu Gulati, 'Judging Measures' (2008) UMKC Law Review, 384–385
[224] Frank Cross and Stefanie Lindquist, 'Judging the Judges' (2009) 58 Duke Law Journal, 1383–1384

Psychologists have also made great efforts to understand the decision-making process of judges. A variety of experiments have been carried out in an attempt to analyse how a judge comes to a decision. The goal of this research is not to evaluate these outcomes. Nevertheless, it is worth mentioning that there are different schools of thought, and that a particular study has indicated that judges, like other human beings, make mistakes when making decisions, that intuitive decisions are common and should not be reproachable, and that expertise does not add much to the improvement of the quality of decisions.[225]

There have also been a limited number of studies aimed at establishing whether specialised tribunals improve the quality of decisions compared to courts of general jurisdiction, but again, without decisive results.[226] One such study focused on establishing whether expert agencies produced better decisions than general judges by examining reversal and appeal rates. The results suggested that the Federal Trade Commission in the US does not outperform generalist judges, with the express recognition that more research is needed.[227]

In relation to the parties, it has been seen that their perception varies according to whether the decision has been made by a generalist or by a specialised judge. Hence, in the US one research study examined to what extent the training of judges in economics had any impact on the appeal rate. The results suggested that in relation to basic antitrust cases where

[225] Linda Berger, 'A Revised View of the Judicial Hunch' (2013) 10 Legal Communication & Rhetoric: JALWD, 7

[226] Lawrence Baum, 'Probing the Effects of Judicial Specialization' (2008) 58 Duke Law Journal, 1681–1683

[227] Joshua Wright and Angela Diveley, 'Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission' (2012) Journal of Antitrust Enforcement 22

the decision had been made by a judge with basic economic training, the appeal rate was lower.[228] This result indicates that parties tend to find judges with good knowledge in the field to be more reliable, at least in simple cases.

To sum up, it is clear that to measure the superiority of a decision made by a judge is a challenging task. It is also clear that there have been studies trying to evaluate the quality of judicial decisions, but that they are not conclusive. The complexity of the task, combined with the time and skills limitations of this researcher, meant that the purpose of this project in terms of assessing the quality of the review decisions made by the Mexican specialised competition tribunal was restricted to evaluating the perceptions that the members of the competition authority (COFECE) and the practitioners had about these decisions. Surely future research which looks at the review process and specific decisions will shed more light on this matter, with the inclusion of the views of third parties such as appellants, infringing companies or complainants.

c. Uniformity

Uniformity is generally described as the application of the same reasoning to cases under similar circumstances. After a certain period of time, it is expected an even application of the same reasoning when small groups of judges hear the same types of cases.[229] Then, the parties in an investigation are provided with the possibility to predict the outcomes, which signifies certainty about the law.[230] This uniformity avoids

[228] Baye and Wright (n 9) 5
[229] Erwin Chemerinsky, 'Decision-Makers: In Defense Of Courts' (1997) 71 American Bankruptcy Law Journal, 115
[230] Baum (n 226) 1678

conflicts in the interpretation of the law, avoids "forum shopping", and allows consistency in the application of the law.[231]

Such predictability is beneficial because citizens will ensure their conduct conforms to the standards of law deduced by the judges when interpreting it, being able to anticipate the consequences of their actions. If predictability is not possible, then adverse "forum shopping" will appear, consisting in similar cases being treated differently depending merely on the subjective reading of the law by multiple judges.[232]

The patent law in the US witnessed the undesirable effects of forum shopping when litigants used to place their cases in their preferred federal courts. Such a situation forced the creation in 1982 of the Court of Appeals for the Federal Circuit (CAFC), after a report was given by the *Hruska* Commission responsible for investigating the matter, according to which patent advocates found that the differences in the application of the law were seen as the major problem, and that forum shopping was widespread across the circuits. However, an assessment of the impact of the CAFC in terms of lack of uniformity showed that the issue was mitigated but not eliminated, and that forum shopping continued long after the CAFC was created.[233]

Uniformity has also been linked with legitimacy. Legitimacy is understood as legal, sociological and moral. Legal legitimacy refers to judicial decisions that accord with the law, sociological refers to the

[231] Zimmer (n 216) 2; Savrin (n 214) 118
[232] Scott Atkinson, Alan Marco and John Turner, 'The Economics of a Centralized Judiciary: Uniformity, Forum Shopping, and The Federal Circuit' (2009) The Journal of Law & Economics, 414, 415; Jack Miller, 'Future of the CCPA' (1978) 60 Journal of the Patent Office Society 11, 682; Amanda Frost, 'Overvaluing Uniformity' (2008) 94 Virginia Law Review 7, 1570, 1571, 1601, 1602
[233] Atkinson, Marco, and Turner (n 232) 411–412

perception that the public has about the appropriateness of a judicial interpretation, which could undermine or enhance the legitimacy of the law and the judges who interpret it, and moral legitimacy refers to an equal application of the law to all citizens.[234]

In conclusion, as has been the case with efficiency and quality, it is unclear whether specialisation provides real benefits in terms of uniformity. For this reason, the aim of this research is to offer some empirical evidence to the debate by examining whether the creation of the specialised competition tribunal in Mexico has enhanced this apparent virtue.

2.1.2. DRAWBACKS

As well as establishing the veracity of the alleged virtues of specialised tribunals – efficiency, quality, and uniformity – this research project also aims to determine the validity of the constant criticism that specialisation has received: loss of independence (or capture). It does so by assessing whether the specialised competition tribunal in Mexico has been captured. For this purpose, this section will describe the literature produced around this suspected disadvantage. Isolation has also been referred to as a possible drawback, but due to time restrictions it will not be included as part of the analysis.

a. Loss of independence (or capture)

It is often argued that by having a small number of judges hearing the same types of cases it might be easier for different members of the

[234] Frost (n 232) 1584–1597

government, or members of parliament, or even lawyers who litigate in that field constantly, to monitor and influence the decisions of these judges.[235] Such influence, it has been indicated, is more likely when the sides that come to the judges are disproportionately represented, such as strong and well-organised law firms on one side, and poorly represented groups on the other, and unlikely when both sides are balanced.[236]

A particular study has shown that specialised tribunals tend to be inclined to make decisions which protect American industries. This finding suggests that companies with highly concentrated markets and political authority may hold great influence over specialised judges, pressing them to implement policies that favour them.[237]

Another study tried to prove whether the specialised judges were prone to capture. In this case, the decisions made by the bankruptcy appellate panel were compared to those made by the district court judges in the US. The result of the study did not show evidence of capture, instead showing that the decisions of both institutions are influenced by their ideological preferences.[238]

Yet a further study showed that the Federal Circuit granted patents easily; in other words, became pro-patent. This study was based on the assumption that the patent bar in the US used high levels of influence during the appointing process of the judges of the new US Court of

[235] Richard Posner, 'Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation And Specialization of the Judicial Function' (1983) 56 S C L REV, 783–785; Robert Howard, 'Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions' (2005) 26 The Justice System Journal, 2, 146; Currie and Goodman (n 10) 80
[236] Rochelle Dreyfuss, 'The Federal Circuit: A Case Study In Specialized Courts" (1989) 64 New York University Law Review 1, 29
[237] Unah (n 215) 851–853, 861, 869.
[238] Shenita Brazelton and Robert Howard, 'Specialization in Judicial Decisions Making: Comparing Bankruptcy Panels and Federal District Court Judges' (2014) 22 ABI Law Review, 407

Appeals for the Federal Circuit, expecting them to favour their interest. The results, as was anticipated, confirmed that such influence also impacted the percentage of patent applications and patent litigation.[239]

The above analysis suggests that specialised tribunals are subject to external pressures. However, it would be naive to assume that generalist courts are immune from such pressures, or at least we cannot say that there is conclusive evidence that specialised judges are more inclined to succumb to them. So, by analysing the reasons why a specialised competition tribunal was created in Mexico, how its members have been selected, and the perceptions of the interviewees, this research may shed some light on whether capture has been in evidence.

2.1.3. CONCLUDING REMARKS

This section has outlined the scarcity of empirical evidence about the advantages and disadvantages that scholars have assigned to specialised tribunals. Accordingly, this research aspires to contribute some experiential evidence with a view to establishing whether the specialised competition tribunal in Mexico has proven to be beneficial in terms of efficiency, quality, and uniformity.

Moving on from the general theory of the benefits and drawbacks of specialised courts, Section 2.2 aims to investigate whether specialisation is suitable in competition law, according to the factors established by Stephen Legomsky.

[239] William Landes and Richard Posner, 'An Empirical Analysis of the Patent Court' (2004) 71 The University of Chicago Law Review, 111, 112

2.2. SPECIALISATION IN COMPETITION LAW

Stephen Legomsky[240] has established the following indicators that should be considered as a framework when contemplating the creation of specialised tribunals: i) complexity; ii) room for discretion; iii) dynamism; iv) high volume of cases;[241] and v) speed. It should be noted that, in terms of the viability of the creation of specialised tribunals, Legomsky has emphasised that the unique properties of every country will dictate the convenience of this model of judiciary. This argument is in line with the theoretical insights about transplants analysed in Chapter 1 (Section 1.1.2). Variables such as the legal system, the type of governance, the population, and the geography have to be considered when discussing specialisation as an option.[242]

As for the purpose of this research project, such indicators are exhaustive and relevant; the aim of this section is to discuss whether competition law calls for specialised tribunals, given the indicators in Legomsky's framework. Next, we examine each indicator in turn.

a. Complexity

Roth claims that competition law involves a form of conceptual analysis and approach that is very different from the traditional legal view, making the existence of specialist judges justifiable.[243] At the same time, it has been asserted that the examination of the terms of competition law,

[240] Stephen Legomsky, *Courts, Administrative Tribunals, and a Cross-National Theory of Specialization* (Clarendon Press 1990) 23–24
[241] The analysis of the volume of cases factor will be ignored at this stage, as specific statistics will be required for this purpose.
[242] Legomsky (n 240) 84
[243] Roth (n 217) 100

guidelines in competition law, decisions made by competition authorities, and judicial decisions when reviewing antitrust cases, evidences the constant use of and analysis of economic and econometric theories in antitrust cases.[244]

Law firms are so conscious of the importance of economics in antitrust cases that they count on expert economists to help them with the understanding and construction of robust mechanisms for the defence.[245] Competition agencies also invest considerable resources in hiring expert economists, for instance, the European Commission created the position of Chief Competition Economist in 2003, a role supported by a team of ten economists.[246] This trend reflects the complexity of the discipline, where, according to Komesa, generalist courts tend to lack training and experience.[247]

The application of economics in antitrust is not new. Evidence about the influence of economic theories in the resolution of antitrust cases dates back to the early 1940s.[248] In fact, as Professor Kaplow has stated, the use of economic analysis in antitrust cases has been significant for many decades, and it is wrong to claim that its use has increased only recently.[249] In some cases its use is crucial to ascertain whether a conduct

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[244] Andriani Kalintri, *Evidence Standards in EU Competition Enforcement: The EU Approach* (Hart Publishing 2019); Despoina Mantzari 'Economic Evidence in Regulatory Disputes: Revisiting the Court Regulatory Agency Relationship in the US and the UK' (2016) 36 Oxford Journal of Legal Studies, 569–570

[245] Maarten Schinkel, 'Forensic Economics in Competition Enforcement' (2007) Amsterdam Center For Law & Economics' Working Paper 05, 16; Damien Neven, 'Competition Economics and Antitrust in Europe' (2006) 21 Economic Policy 48, 748–750

[246] Neven (n 245) 751–752

[247] Neil Komesar, 'Stranger in a Strange Land: An Outsider's View of Antitrust and the Courts' (2010) 41 Loyola University Chicago Law Journal, 444, 445, 447, 448, 450

[248] Frederick Rowe, 'The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics' (1984) 72 Georgetown Law Journal, 1520–1522

[249] Louis Kaplow, 'Antitrust, Law & Economics, and the Courts' (1987) 50 Law and Contemporary Problems 4, 184–188

has been anticompetitive, to establish the causality between the conduct or operation and past, present or future outcomes, to establish the occurrence and extent of damages, the selection of the most suitable remedies, or, in short, the success of the case.[250] It has even been stated that economics is the science that provides the rationality required to interpret any substantive antitrust rule.[251]

Neven measured the influence of economics in antitrust policy and practice in Europe. After assessing the involvement of economists in competition investigations, as well as the use of economic reasoning in legal frameworks, policymaking, and case decisions, his main finding was that the influence has been notorious.[252] One particular finding was that the resources invested by the parties in economic consultancy compared to those invested by the European Union are disproportionate.[253] Another important finding was that the Commission has increased the use of economic insights and economic theories, but most importantly that the European Court of Justice on different occasions has overturned the decisions made by the Commission due to a lack of appropriate economic reasoning behind a finding.[254]

The outcomes of Neven's study lead to the following inferences: i) the parties invest good resources in acquiring economic expertise in order to be well-prepared to defend a case, but how well-prepared is a judge to

[250] Frederic Jenny, 'Improving Judicial Control of Administrative Decisions in Competition Enforcement' in Abel M. Mateus and Teresa Moreira (eds), in *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America* (Edward Elgar Publishing Limited 2010) 71, 78–79; United Nations, 'Economic and Econometric Evidence in Competition Law: an Empirical Perspective' <http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Economic-Competition.aspx> accessed 5 March 2018; Schinkel (n 197) 1, 2, 5.
[251] Paolo Buccirossi, *Handbook of Antitrust Economics* (The MIT Press 2008) 9
[252] Neven (n 245) 743–744
[253] Ibid. 752
[254] Ibid. 760–761

discern, and evaluate such expertise? ii) if the European Court of Justice has found that the economic analysis and evidence presented by the Commission in *Airtours, Tetra Laval/Sidel, GE/Honeywell* and *Schneider/Legrand* were wrongly conducted,[255] would a generalist court in Latin America have the same capacity to detect whether the economic evaluation presented by the competition agency was adequate?

The same concern has been expressed by the United Kingdom Competition Authority – the Competition and Markets Authority – when contributing to the OECD's Global Forum on Competition. The UK's contribution, entitled "Judicial Perspectives on Competition Law", examined the privileged position of specialised competition agencies in evaluating the evidence in competition cases in comparison to generalist courts, which have difficulties dealing with complex economic matters, but whose decisions nevertheless prevail over those of the specialised agency.[256] It is important to mention that this position was presented by a country that has a specialised competition tribunal – CAT, the Competition Appeal Tribunal. In relation to Latin America, De Leon asserts that when reviewing antitrust cases judges do not have the cross-disciplinary training required to understand the technical concepts used by economists.[257]

Given the importance of economics in competition law analysis, it is clearly important for judges to understand the underlying economic theories. Even Judge Posner stated that "*econometrics is such a difficult subject that it is unrealistic to expect the average judge or juror to be*

[255] Ibid. 760
[256] OECD, Global Forum on Competition – Contribution from United Kingdom: Session II, December 2017, 6 <https://one.oecd.org/document/DAF/COMP/GF/WD(2017)32/en/pdf> accessed 30 January 2019
[257] De Leon (n 130) 206

able to understand all the criticisms of an econometric study, no matter how skilful the econometrician is in explaining the study to a lay audience."[258] France and the UK acted accordingly by concentrating the antitrust cases in the hands of few judges who had attained a better understanding of economic issues.[259]

A limited understanding of economics and competition law in reviewing process undermines the goals of antitrust law if generalist courts wrongly overturn antitrust cases or solve them based purely on procedural issues. Competition agencies in developing countries responding to the International Competition Network (ICN) survey in 2003 firmly sustained that the judiciary was an obstacle to effective competition enforcement because "*judges do not understand competition law and are content to avoid the necessity to learn through diverting competition issues into a maze of esoteric administrative and procedural side-streets out of which the substantive matters at issue rarely emerge*".[260]

In 2006, in response to another ICN survey, some competition authorities, particularly in developing countries, when asked why competition authorities' decisions are overturned, answered that one of the most persistent reasons for decisions being wrongly overturned was that judges did not possess sufficient understanding of economic concepts.[261] Equally, it has been reported that the lack of knowledge of basic

[258] Posner (n 8) 91–99
[259] Ehlermann Claus-Dieter and Isabela Atanasiu, 'European Competition Law Annual: 2000' in *The Modernisation of EC Antitrust Policy, Panel Three, Courts and Judges* (Hart Publishing 2001) 501, 502; OECD (n 256) 6
[260] International Competition Network, 'Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies' (2003) 35 <http://internationalcompetitionnetwork.org/uploads/library/doc364.pdf> accessed 18 August 2018
[261] International Competition Network, 'Competition and the Judiciary. A Report on a Survey on the Relationship between Competition Authorities and the Judiciary' (2006) 9, 10 <https://www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf> accessed 10 August 2018

economic concepts and competition law has negatively impacted the development of the competition regimes in Jamaica, Russia,[262] and the levels of enforcement in Mexico.[263] In turn, the OECD reported that after surveying some young competition agencies with regard to the judicial appeals procedure, it was found that in El Salvador, for example, delays were the rule, and the review process its main issue.[264]

Recently, in 2015, the ICN undertook another project led by the Advocacy Working Group named "Competition Culture Project", which, among other findings, reported that from the 50 competition agencies around the world surveyed as part of the project, only a minority indicated that their judges had a good understanding of economic evidence.[265] This consensus about the poor handling of economic arguments amid the judiciary has led Easterbrook to affirm that "*antitrust is an imperfect tool for the regulation of competition*".[266] In line with this claim, Ezrachi has also identified the capacity of the judiciary to understand the complexity of evolving economic theories in competition law as a significant challenge. Ezrachi affirms that, as a result, some courts have substituted the analysis of complex econometric analysis for the analysis of procedural issues.[267]

Another example that reinforces the role of economics is the task force created by the American Bar Association – Antitrust Section – that is comprised of antitrust economists, lawyers and academics, with the

[262] Michal Gal, 'When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources Are Scarce' (2010) 41 Loyola University Chicago Law Journal, 427–428
[263] Aydin and Buthe (n 141) 16
[264] OECD (n 256) 21–22
[265] ICN (n 20)
[266] Frank Easterbrook, 'The Limits of Antitrust' (1985) 21 Occasional Papers from the Law School, the University of Chicago, 23
[267] Ariel Ezrachi, 'Sponge' (2017) 5 Journal of Antitrust Enforcement, 63

purpose of examining the role of economic evidence in the federal courts. The results showed that there was a consensus around the importance of the use of economics in modern antitrust law, and around the importance of judges understanding economic concepts in order to avoid wrong decisions that increase costs of litigation. But, more importantly, it was revealed that 38% of the economists interviewed believed that judges only sometimes understand economic issues.[268] Thus, it has been claimed that it is very unlikely that a judge without an economic training could come to a correct decision in antitrust cases based purely on precedents, untrained intuition or by interpreting the law.[269]

In January 2016 the European Commission presented the findings of their final report "The study on judges' training needs in the field of European competition law", whose most important recognition was that in relation to private enforcement generally judges have little knowledge and understanding of economic processes, which are rarely covered during their academic studies or initial training.[270] Such a finding signified the acknowledgment of the need for judges to be trained as a high priority. This finding advances the following proposition: if the lack of competition knowledge amid the judiciary is still an issue in Europe in 2016, a region with long historical experience of the implementation of a competition policy and good levels of competition culture, then what is expected in Latin American countries?

Institutionally, in the context of antitrust, Komesar affirms that generalist courts underperform agency-employed specialists due to the complexity

[268] Jonathan Baker and Howard Morse, 'Memorandum to Offices and Council. Final Report of Economic Evidence Task Force' August 1, 2006, P. 2, Appendix II, p. 2
[269] Baye and Wright (n 9) 4
[270] John Coughlan, 'The Training of National Judges on EU Competition Law' (2016) 17 Era Forum 1, 122

of the field, and the lack of training and experience. As part of his institutional analysis, Komesar identifies a trade-off between expertise and bias, where the risk of bias increases with specialisation. Nonetheless, after considering the general claim of inexpert reviewers often substituting procedural focus for substantive focus, in a field characterised by complexity, his suggestion is that the cost of inexpert decision-makers exceeds the correction of bias.[271]

Critics of specialisation in competition law have stated that reviewing tribunals just need a good understanding of the meaning of fairness, in which they are experts,[272] adding that lawyers should be compelled to explain the matters using simple language.[273] They also point out that not all matters in antitrust cases are related to economic issues, rather, they sometimes reside in procedural issues, and that any generalist judge would be expected to be well-placed to protect procedural rights in any field.[274]

In relation to the argument according to which fairness should be enough to solve any type of case, it is important to highlight that the use of "fairness" in competition law is debatable. Among the reasons given to disregard such use is that rigorous evidence and thorough economic analysis cannot be replaced by a sense of fairness, which is not an operational concept.[275] It has been claimed also that certainly a fair

[271] Komesar (n 247) 444–450
[272] Statement by Judge Leventhal in Currie and Goodman (n 10) 81–82
[273] Rakoff (n 12) 13
[274] OECD (n 19) 70
[275] Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications' (2018) 9 Journal of European Competition Law & Practice 4, 211–212

society must apply the competition rules strictly without a disregard for economics.[276]

Likewise, during the policy roundtables organised by the OECD in 2008, two procedures were suggested to help with presenting complex economic theories to the judges: i) the elaboration of a list with practical questions that judges should exhaust to verify the credibility of what experts assert; and ii) the presentation of economic reasoning in a very basic form, using real-life examples, analogies, and visual aids.[277]

The above analysis offers the following perspectives. First, that it is hardly controversial that economics nourishes antitrust law. Second, that antitrust appears to be a complex matter because of its use of economics. Third, that judges need to understand economics to correctly solve antitrust cases. Fourth, that lack of competition knowledge and economics amid the judiciary constitutes one of the most common claims made by competition authorities as to why their decisions have been persistently wrongly overturned. Fifth, the most fundamental question, and one which remains unclear, is identifying whether, due to such complexity, specialised competition tribunals are in a better position to deal with antitrust cases than generalist courts, at least in Latin American countries.

b. Room for discretion

[276] <https://chillingcompetition.com/2017/02/22/competition-law-as-fairness/> accessed 7 February 2019

[277] OECD, 'Techniques for Presenting Complex Economic Theories to Judges', 7–9 <http://www.oecd.org/competition/abuse/41776770.pdf> accessed 7 March 2016

The broadness of the law compels judges to interpret it and to indicate what lawmakers intended by creating it. This process of converting vague words of the law into a well-defined understanding of its terms and scope could be understood as a process of discretion. In relation to competition law, such broadness is a perceptible characteristic.[278] In the US the primary federal antitrust laws are imprecisely phrased, with the federal courts and antitrust agencies being responsible for the development of their interpretation.[279]

Besides developing the interpretation of broad competition law, it has been asserted that judges also act as policymakers when reviewing antitrust decisions. Cavinet indicates that this function is undertaken when judges ensure the protection of the fundamental rights of the investigated parties, confirming that the powers of the regulatory authorities are not absolute.[280] Likewise, judges need to perform a balancing exercise by pondering the issues of the case in the context of economic goals, employment, protection of local industries or protection of small businesses.[281]

Similarly, Ariel Ezrachi has examined three aspects that have made of competition law an unpredictable and unstable discipline. First, he asserts that diverse components like economic development, market realities, domestic culture, government, and enforcement structure result in differences among jurisdictions about the values, aims, interpretation and application of competition law.[282] One example used to illustrate such a

[278] OECD (n 19) 10, 16
[279] Thomas Jr Piraino, 'Reconciling the Harvard and Chicago Schools: New Antitrust Approach for the 21st Century' (2007) 82 Indiana Law Journal 2, 346
[280] OECD (n 19) 22–23
[281] Ibid. 19
[282] Ezrachi (n 267) 51, 52, 54

claim is the appraisal of merger transactions in South Africa, where aspects such as employment or the impact on particular sectors or regions are included as part of the examination.[283] This argument encompasses the theoretical framework about informal institutions (values) and domestic realities set out in Chapter 1.

A second aspect examined by Ezrachi is the analysis of economics in competition law. He informs that the analysis varies according to the context and market realities,[284] adding that it is possible that economic experts analyse the economic theories in such a way that, using similar principles, their outcomes underpin the claims of a particular party.[285] One final aspect is the role played by regulation, which sets the scope of competition law in diverse sectors. The author uses the case of the Hong Kong regime to illustrate the exclusion of airports, broadcasting and housing from its application.[286]

One more indication that there is room for discretion in antitrust cases is the fact that scarcity of resources influences the decision whether to open investigations or reject claims. It is a common practice that competition authorities invest their limited resources in combating the conducts that are considered more harmful to their markets or investigating cases that may have a bigger impact among the public.[287] The discretionary power is also exercised when launching sector inquiries to detect anticompetitive behaviours in particular markets.[288]

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[283] Ibid. (n 267) 58
[284] Ibid. (n 267) 61
[285] Ibid. (n 267) 62
[286] Ibid. (n 267) 64
[287] Aditya Bhattacharjea, 'Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-Comparative Analysis' in D. Daniel Sokol, Thomas K. Cheng and Ioannis Llanos (eds), in *Competition Law and Development* (Stanford University Press 2013) 59, 61, 65
[288] Jose Laguna de Paz, 'Understanding the Limits of Judicial Review in European Competition Law' (2014) 2 Journal of Antitrust Enforcement 1, 213

From the above analysis it can be extracted that in competition law there is room for discretion given the following: i) the terms of the competition regimes are usually broad, and their interpretation rests on the competition agencies or on the judges when reviewing, ii) in antitrust cases interpretation and implementation includes an array of mixed goals such as economic, social, or industrial, from which a balance needs to be found, iii) the scarcity of resources is a factor that in the competition field determines which cases are investigated. For all these reasons, it could be said that competition law is a field characterised as presenting room for discretion, according to Legomsky's indicators, and therefore a specialist treatment is suitable.

c. Dynamism

Considering that one of the main purposes of competition law is to invigilate the functioning of markets,[289] the incessant change of the latter means that competition law must also adapt or perhaps evolve. The markets are subject to drastic and quick changes such as transitioning from monopolistic to open, regulated to deregulated, or paternalistic to more liberal. In the same way, competition law has shown different approaches such as the *per se* rule to the rule of reason.

Similarly, as technology continually advances, competition rules need to advance too. It is imperative, then, that competition principles

[289] On the aims of competition law *see* Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law', (2013) CLES Working Paper Series 3, 3–4 <https://www.ucl.ac.uk.cles/research-paper-series/research-papers/cles-3-2013> accessed 4 February 2019; Margot Horspool and Matthew Humphreys, *European Union Law* (7th edn Oxford University Press 2012) 429; David Gerber, 'The Goals of European Competition Law: Time for a Comprehensive Debate on its Objectives' in *The Goals of Competition Law* (Edward Elgar 2012) 85–92; Eva Lachnit, *Alternative Enforcement Of Competition Law* (Eleven International Publishing 2016) 11–14

accommodate the new features of markets by recognising the use of new technologies when doing business, as well as the development of certain markets, the emergence of new markets or disappearance of others, and the evolving needs of consumers too. It has been recognised that technology markets are considered dynamic and complex ones due to rapid changes in resources, data usage, products, and demand characteristics. The challenge derives from the difficulty to accurately predict the behaviour of its players.[290]

To illustrate the challenge offered by technology markets, it is appropriate to cite the concern shared by the European Commission regarding digital technology as a disruptive global force.[291] This institution has indicated that dominant platform businesses are in a position to manipulate the way the platform works, to give some advantage to their own service, or to make it hard for others to compete. To support its assertion, the Commission mentioned the fine imposed on Google for abusing the power of its search engine, as well as the potential risk that Amazon might misuse the data that links sellers and buyers to reinforce its position as seller.[292]

Another market that exemplifies high levels of dynamism is the digital economy.[293] It has been affirmed that such a dynamic environment represents a significant challenge for enforcers. At a policy level, it also represents an important hurdle, considering that it is difficult to establish

[290] Ezrachi (n 267) 64, Geoffrey A Manne and Joshua D Wright, 'Innovation and the Limits of Antitrust' (2010) 6 Journal of Competition Law and Economics, 153–154

[291] European Commission, <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/new-technology-disruptive-global-force_en> accessed 4 February 2019

[292] European Commission, <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/new-technology-disruptive-global-force>_en accessed 4 February 2019

[293] Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (2018) The European Consumer Organisation, 2 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 6 February 2019

whether new business strategies or new forms of interaction with consumers may be a competition problem, or if the application of competition law in such cases would be effective.[294] In this context, it has been asserted that at times the line between research and development that promotes the consumer interest and innovation that is used to exploit or to exclude becomes blurred.[295]

One more example of the dynamism that characterises competition law is the interplay between digital markets and data protection. In Germany, for instance, in the market for social networks, Facebook was investigated for apparent abuse of its dominant position by imposing onerous conditions with respect to its data collection from users.[296] Although digital markets serve as a good illustration of how innovation drives dynamic competition, other activities exemplify very well the daily dynamisms observed within these markets, such as product differentiation or rapid response to change from new market opportunities, whether provoked by changes in taste or other forces of imbalance.[297] All the reasons highlighted above confirm that competition law is a dynamic field and at the same time a challenging one, as competition authorities and judges must make their decisions against the backdrop of constant new realities offered by the markets.

d. Speed

[294] Ibid.
[295] Ariel Ezrachi and Maurice Stucke, 'Digitalisation and Its Impact on Innovation' Report Prepared for the European Commission, DG Research & Innovation (July 2018)
[296] Ezrachi (n 293) 14
[297] Gregory Sidak and David Teece, 'Dynamic Competition in Antitrust Law (2009) 5 Journal of Competition Law and Economics 4, 603 <https://www.criterioneconomics.com/docs/dynamic-comp1.pdf> accessed 14 October 2019

In competition law, especially in relation to mergers, time is crucial. In Europe the General Court (previously Court of First Instance – CFI) introduced a new expedited procedure, which came into force on 1 February 2001.[298] According to that modification, the General Court has the discretion to grant a *fast-track* procedure to appeals against merger decisions grounded in urgency issues, consisting of giving more emphasis to the oral procedure and simplifying the written one.[299]

Under the *fast-track* procedure it is possible for parties to obtain a review decision in less than 12 months, contrary to the 20 months it would have taken under the normal procedure (it has been said that even 12 months is a long time for parties to wait for a decision).[300] The General Court has granted the expedited procedure required by the parties in almost every single case,[301] which denotes that merger cases are regarded as urgent matters mainly because market conditions change so rapidly that even an overturned refusal decision by the General Court might be unworkable because the parties would not be able to pursue the transaction in time.[302]

When a third party appeals an approval merger decision, time is also critical.[303] The suspension of a transaction pending adjudication could be a very expensive process for the parties, and it might also be that in the end, even if the approval is confirmed by the General Court, the deal is not feasible because of the time factor. Such is the importance of

[298] Rules of Procedure of the Courts of First Instance of the European Communities of 2 May 1991, OJ L 136 of 309 May 1991, corrigendum published in OJ 317 of 19.11.1991, p 34, as amended
[299] European Commission, 'Judicial Review and Merger Control: The CFI's Expedited Procedure', 7–9 <http://ec.europa.eu/competition/publications/cpn/2002_3_7.pdf > accessed 8 March 2016
[300] Francisco Todorov and Anthony Valcke, 'Judicial Review of Merger Control Decisions in the European Union' (2006) 51 The Antitrust Bulletin 2, 376–377
[301] The CFI has refused the expedited procedure in *Ineos Phenos v Commission, T-103/02*, on the grounds of lack of urgency and complexity of the pleadings.
[302] Richard Whish and David Bailey, *Competition Law* (7th edition, Oxford University Press 2012) 894–895
[303] European Commission (n 299) 9

avoiding delays in merger cases, particularly in the context of multi-jurisdictional mergers, that the ICN has introduced a practical guide to international enforcement cooperation in mergers, aiming to ensure efficient procedures.[304]

Mergers are a good example of how important it is to achieve prompt judicial review decisions in the field of competition law. The same speed is required in digital markets due to the dynamism shown by these types of industries, where the remedies need to be imposed before innovation forces their change or disappearance. The same necessity is observed pending a final decision adjudicating responsibility in the commission of an anticompetitive conduct. These observations underpin the pertinence of adopting specialised courts in competition law.

2.2.1. CONCLUDING REMARKS

The preceding examination has illustrated that there is room for discretion when applying competition law, that competition law is a dynamic field, and that speed in competition law is essential. Having seen that the requirements of speed, room for discretion, and dynamism are present in competition law, the deduction is that this discipline fits Legomsky's framework. In relation to the complexity factor, this section has underlined the disagreement among scholars with regard to the necessity of specialised tribunals in competition law.

Such controversies have arisen over allegations of the complexity of the field (mainly derived from the predominant use of economics), on the one

[304]International Competition Network, 2 <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf> accessed 8 March 2016

side, and on the other, the argument that judges are simply in need of a sense of fairness to solve any dispute, that not all the matters in antitrust cases are related to economic reasoning, and that if economic matters were explained in a simple manner then any judge would be able to solve them correctly.

Chapters 4 and 5 will provide empirical insights into how insufficient it is to apply merely this "sense of fairness" to accurately review antitrust cases. They will also reveal that a complexity factor characterises competition law, and that specialised tribunals may be more necessary for developing countries.

The aim of Section 2.3 is to provide an overview of the theory of specialised competition courts in developing countries, as the main goal of this research is to give guidance to Latin American countries that might contemplate this type of judiciary. The importance of the review rests on the particularities shown by these countries.

2.3. SPECIALISED COMPETITION TRIBUNALS IN DEVELOPING COUNTRIES

The scarcity of resources is a key issue that provokes divergence among scholars when considering the adoption of specialised competition tribunals in developing countries. One end of the spectrum argues that developing countries should focus their scarce resources on the most harmful anticompetitive conducts, while at the other end are those who argue that investing in this type of judiciary is a sensible option for these countries considering that the expertise of the judges would strengthen the levels of competition culture and would enhance the development of

their new regimes.[305] The next part describes the relevant arguments in more detail.

a. Arguments supporting the adoption of specialised competition tribunals

Thomas Arthur's view is that specialised competition tribunals are superior to generalist ones thanks to their expertise. His argument is that generalist tribunals are suitable only to apply *per se* rules, and if the goal is to develop and enforce competition law then adopting specialised competition tribunals is the best option.[306]

Similarly, Fels and Ng state that specialised competition tribunals are preferable in developing countries. Their view finds support in the presence in such countries of the three following factors: i) weak competition culture; ii) high levels of corruption amid the judicial and administrative systems; and iii) lack of resources. Their suggestion is that having tribunals with knowledge of competition law strengthens the competition advocacy approaches urgently needed in developing countries.[307]

In turn, Savrin indicates that it would be unrealistic to expect generalist judges in developing countries to handle properly and efficiently antitrust cases considering their low levels of exposure, and the novelty and complexity of the field in terms of the economic analysis required. In this

[305] Thomas Arthur, 'Competition Law and Development: Lessons from the U.S. Experience' in D. Daniel Sokol, Thomas K. Cheng and Ioannis Llanos (eds), in *Competition Law and Development* (Stanford University Press 2013) 77–78
[306] Ibid.
[307] Allan Fels and Wendy Ng, 'Rethinking Competition Advocacy in Developing Countries' in D. Daniel Sokol, Thomas K. Cheng and Ioannis Llanos (eds), in *Competition Law and Development* (Stanford University Press 2013) 183

context, such an argument could be linked with the preceding theoretical insights offered by Legomsky about complexity as a factor determining the necessity of adopting specialised tribunals (Section 2.2). Therefore, specialised tribunals with a good knowledge of antitrust law and economics would are best placed to develop this area of law.[308]

Similarly, Gal has established that incompetent judiciaries impede the effective enforcement of competition law in developing countries. She asserts that the main issues amid the judiciary in such countries are the low levels of expertise in antitrust matters, lack of experience, and lack of understanding of economic concepts. In her view, these shortfalls negatively affect the role of the competition agencies and reduce the credibility of the antitrust enforcement. For this reason, she claims that one alternative to remedy such concerns is the adoption of specialised competition tribunals, indicating that the appeal court should be limited in its review to significant errors of law or fact, and thereby reduce the likelihood that unknowledgeable judges dispose cases based on procedural issues rather than on the merits of the case.[309]

In light of the above discussion, although Mateus does not express clear support for the adoption of specialised competition tribunals in developing countries, he indicates that the poor performance of the judiciary in such an area could have a negative impact.[310]

The general overview of the considerations that support the adoption of specialised competition tribunals in developing countries reveals the scarcity of resources to be an important but not exclusive factor. Other

[308] Savrin (n 214) 126
[309] Gal (n 2) 41–42
[310] Mateus (n 118) 127–136

aspects such as low levels of exposure, corrupt judiciaries, novelty of the field, complexity of the field, and levels of competition knowledge have also been noted as relevant to justify the adoption of such a type of judiciary.

b. Arguments against the adoption of specialised competition tribunals

George Priest's approach to this issue is that differences in competition law policies between developing and developed countries are meaningless. His key argument is that every country faces a scarcity of resources, and that every country is at a developing stage where improvements are always an opportunity for economic progress. There are, then, in his view, four universal principles that every country should follow: a) prohibition of cartels; b) prohibition of monopolies; c) prohibition of exclusionary practices; and, d) free entry to markets. The implication of Priest's argument is that if there is no reason to differentiate between developing and developed countries in terms of competition law based on their economic or cultural conditions, then any discussion about the necessity of specialised competition tribunals in developing countries is futile.[311]

Aditya Bhattacharjea argues that developing countries should focus their scarce resources on fighting basic offences which are clear and robust, such as hard-core cartels, and on investigating cases that have an extensive effect on the poor. She estimates that given the complexity of competition law, and the conditions that characterise developing

[311] George Priest, 'Developing Nations – The Absolutist View' in D. Daniel Sokol, Thomas K. Cheng and Ioannis Llanos (eds), in *Competition Law and Development* (Stanford University Press 2013) 79–89

countries such as scarcity of resources, business opposition, lack of competition culture, dilatory procedures, and anticompetitive government policies, among others, the investigation of complex offences is challenging and expensive. So, only once knowledge and experience are acquired should infant agencies move progressively from basic to complex conducts.[312] According to Bhattacharjea's approach, the proposition is that competition agencies in developing countries should avoid the encounters of complex analysis, making the existence of specialised competition tribunals perhaps unnecessary.

This lack of resources and expertise common to developing countries, as claimed by Bhattacharjea, is in line with Cook's view on the high levels of uncertainty that young competition agencies face when investigating complex conducts like predation. For Cook, in developing countries the collection of sufficient data to study the markets and their structure in depth is difficult, which makes the establishment of market dominance or strategic behaviour highly challenging.[313] The natural deduction from this would be to focus scarce resources on uncomplicated conducts, for which specialised competition tribunals may not be necessary.

The same reasoning has been shared by Rodriguez and Menon, who after considering the common hurdles that developing countries experience, stated that a derivative recommendation is to focus, at least in the short-term, on horizontal practices, since the investigation of more ambiguous activities is expensive and increases the likelihood of errors. For them, the possible benefits of investigating equivocal behaviours do not

[312] Bhattacharjea (n 287) 59, 61, 65
[313] Paul Cook, 'Competition and its Regulation: Key Issues' (2002) 73 Annals of Public and Cooperative Economics 4, 551, 554

counterbalance the great costs of such tasks.[314] The assumption, then, is that if only indisputable conducts should be pursued, due to scarcity and lack of expertise, then specialised competition tribunals are not essential.

Likewise, Alvaro Santos's view is that investors care more about tax exemptions, skilled labour, political instability or price instability than effective tribunals, adding that it is contestable that effective tribunals produce economic development.[315] Focusing on the needs of users, there is empirical evidence to show that in developing countries there is a divergence between the perceptions of market agents and policymakers with regard to the goals of antitrust policy.[316]

In this sense, the World Bank has recognised that when contemplating the possibility of creating specialised tribunals, it is necessary to analyse internal and external needs; internal needs in terms of improving decision-making and external needs in terms of users. By considering both aspects, it becomes easier to accurately establish whether specialised tribunals are necessary and if so which type. If specialised tribunals are not required, then different types of settlement or operational tribunal changes should be contemplated.[317]

The analysis of the above literature leads to the following observations. In Priest, Bhattacharjea, Cook, and Rodriguez and Menon's arguments the common topic is the scarcity of resources. However, for Priest such

[314] Rodriguez and Menon (n 140) 39–42
[315] Alvaro Santos, 'The World Bank's Uses Of the 'Rule of Law' Promise in Economic Development' in David M. Trubek and Alvaro Santos (eds), in *The New Law and Economic Development. A Critical Appraisal* (Cambridge University Press 2006) 281–290
[316] Ignacio De Leon, *What Features Measure Economic Competition in Developing Countries? – The Economic Characteristics of Developing Jurisdictions. Their Implications for Competition Law* (Edward Elgar Publishing 2015) 48–49
[317] Gramckow and Walsh (n 209) 5

scarcity is present in every country, by which (in a highly simplistic way), the author assumes that universal principles in antitrust are enough, disregarding the need for different approaches, as in his view every country is developing. This view that socio-economic conditions or culture are unimportant does not seem accurate in the light of the analysis provided by Sections 1.1.3 (Institutional Change) and 1.1.4. (Culture). Aditya, Cook, and Rodriguez and Menon advance the analysis by considering that developing countries are affected by scarcity of resources, but also by particular conditions which mean that the focus on complex antitrust cases seems an inappropriate and expensive choice.

2.3.1. CONCLUDING REMARKS

Comparing the arguments presented in *pro* and *against* specialisation in competition law in developing countries, the finding is that both positions present good cases based on persuasive opinions. Therefore, both perspectives should be considered when contemplating the introduction of specialised competition tribunals. This is particularly the case in the context of this research project which aims to establish whether: i) Latin American countries are afflicted by scarcity of resources; ii) they show important economic or cultural endowments that impair the effective implementation of competition policies; and, iii) the adoption of the specialised competition tribunal in Mexico has been a correct and inexpensive institutional reform.

Section 2.4 is concerned with international organisations encouraging developing countries to adopt specialised competition tribunals. This analysis is vital because the recommendations given by international organisations are highly regarded by developing countries, which depend

on the assistance provided by such organisations. So, the outcomes of this analysis help determine to what extent the Mexican government has been persuaded by international organisations to create the specialised competition tribunal (Chapter 5).

2.4. SPECIALISATION: INTERNATIONAL ORGANISATIONS

The following analysis links to the theoretical framework about transplant of institutions examined in Chapter 1.1.2, particularly to the motivation typology "Externally Dictated Transplant", traditionally seen in developing countries pursuing trade agreements, financial aid or political autonomy.[318] So, considering that developing countries often adopt laws, policies or institutions because of imposed treaties or international pressure,[319] the aim of this section is to establish to what extent Mexico was persuaded by international organisations to adopt the specialised competition tribunal. The understanding of such a role provides this thesis with a more comprehensive perspective to evaluate the performance of the Mexican competition tribunal.

To answer the above-mentioned inquiry this section focuses the analysis on the three main international organisations that offer assistance to developing countries, and that in terms of the judiciary have been given recommendations about how advisable the adoption of specialised tribunals would be. The overview starts with the Organisation for Economic Co-operation and Development (OECD), then moves to the World Bank (WB), and ends with the international competition network (ICN). After introducing the purpose and structure of such organisations,

[318] Miller (n 68) 847–849
[319] The author indicates that most developing countries adopted competition rules as a result of international pressure or imposed treaties, see Waked (n 110) 69.

it reviews the particular recommendations given by them to Latin American countries. The data presented following the analysis will inform the discussion of the results in Chapter 5.

2.4.1. THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

The OECD was the result of an agreement between 18 European countries, the United States and Canada, interested in attaining economic development after the World War II.[320] Today the organisation has 34 members among the most developed economies and some emerging economies like Mexico, and its main goal is to fight poverty and promote prosperity through economic growth and financial stability.[321]

The organisation has a council where the representatives of member countries take decisions by consensus. There are some committees where specific issues are reviewed, and ideas are discussed and implemented. There is a an Office of the Secretary-General where the information is collected and given to the committees.[322]

Thus, the performance of individual countries, whether members or not, is reviewed by their peers, and the conclusions drawn may lead to the signature of agreements, to the design of standards, or may include a set of recommendations. Particularly in terms of competition law, the OECD has been working with Latin American countries by suggesting the

[320] OECD, Convention, 14th December 1960 <http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm> accessed 21 February 2016
[321] OECD <http://www.oecd.org/about/whodoeswhat/> accessed 26 February 2016
[322] OECD (Ibid.)

implementation of competition policies following peer reviews, as the next part illustrates.

a. Specialisation: peer reviews in competition law in Latin America

The OECD through a follow-up process revised the peer reviews of competition law and policy that in previous years were conducted in Argentina, Brazil, Chile, Mexico and Peru. In general terms, the organisation reported that judicial review was a recurring issue encountered by some of these countries, recommending the creation of specialised competition tribunals. This organisation also recognised that such a step would require new legislation that would not be easy to obtain, suggesting as an alternative the implementation of a training process, which would be easier to deploy.[323] Although the focus of this research project is Mexico, the next part includes a more detailed analysis of the peer reviews conducted in Brazil and Argentina. Such analysis is relevant considering that the aim of this section is to examine the role of international organisations in the implementation of specialised competition tribunals in Latin America, as well as to show that Brazil is a good example of a country that may find useful lessons in the Mexican experience after the adoption of a specialised competition tribunal was recommended by the OECD there.

i. Brazil

- In 2005 the competition law and policy of Brazil was reviewed. One of the recommendations given by the OECD was the creation

[323] OECD, 11 <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/39472133.pdf> accessed 7 March 2016

of specialised judges and appellate panels to resolve competition law issues, mainly because the scope of the review undertaken by the judiciary at that time was limited to just procedural irregularities.[324] Although this organisation does not present the specific reasons that underpin their recommendation, if we look back at the complaints about the lack of knowledge in competition law and economics amid the judiciary, as well as its negative impact, examined in Section 2.2, it is understandable why the OECD provided it.

- In 2010, Brazil was the object of another peer review, and this time the recommendation consisted of avoiding the first review instance and to appellate directly to the second level appeals court. The reason for such a recommendation was the small number of competition law cases reported, and the disregard shown by the Brazilian government when they failed to consider the recommendation given in 2005 to adopt specialised competition judges.[325]

ii. Mexico

- In 2004 the competition law and policy of Mexico was reviewed, with the conclusion in terms of judicial review that specialised judges were required, following the finding that tribunals were unfamiliar with economics.[326]

[324] OECD, 112 <http://www.oecd.org/daf/competition/35445196.pdf> accessed 26 February 2016
[325] OECD, 80 <http://www.oecd.org/daf/competition/45154362.pdf> accessed 26 February 2016
[326] OECD, 69 <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/31430869.pdf> accessed 28 February 2016

- In 2007 the OECD conducted a follow-up process, reporting that a training process for judges and magistrates in competition law had been undertaken, but results were still pending to prove their effectiveness, and that the issues requiring new legislation were still unresolved.[327]

- In 2013 when reviewing the assessment and recommendations given to Mexico, the OECD expressed that judicial delays remained a significant issue, emphasising the importance of implementing the specialised competition tribunal created after the Constitutional reform introduced in 2011 but still pending.[328] It could be deducted that the OECD insisted on such institutional reform because one of the benefits attributed to this type of judiciary is efficiency, as discussed in Section 2.1.1.

iii. Argentina

- In 2006 the competition law and policy of Argentina was reviewed, which in terms of judicial review, concluded that the competition authority of that country was fortunate to have quasi-specialist judges in the tribunal of Buenos Aires.[329] This conclusion may derive from the alleged benefits attributed to specialised courts as described in Section 2.1.1.

b. Specialisation: general considerations

[327] OECD, 31–32 <http://www.oecd.org/daf/competition/2007Follow-up-LA-peer-reviews_EN.pdf> accessed 28 February 2016
[328] OECD, 'Economic Surveys, Mexico' (2013) 22
[329] OECD (n 135) 51

In 1996, the OECD organised a seminar on judicial enforcement of competition law, where it was said that experience had not demonstrated that specialised tribunals were imperative for effective judicial enforcement. Nevertheless, it was indicated that specialised competition tribunals are more disposed to and capable of dealing with policies within the competition field.[330]

Also in 2013 the OECD, in relation to judicial performance, made the following observations: i) that the judicial system is a factor that impacts the economic performance of a country; ii) that specialised tribunals would be more efficient and their decisions more consistent; and, iii) that specialisation would deprive judges from learning and applying different areas of law in the decision-making process.[331]

The analysis of the peer reviews conducted by the OECD in different Latin American countries, as well as the studies that in general review judicial performance, exposes that: i) this international organisation has clearly advocated the adoption of specialised competition tribunals for Brazil and Mexico, as an antidote to confront delays, lack of familiarity with economics, and preference to solve antitrust cases based on procedural irregularities; and ii) that such an organisation has opened spaces to debates about the benefits and drawbacks of specialised competition tribunals. The relevance of this finding is that, in light of the theories of transplants (Section 1.1.2) and design of institutional transplants (Section 1.1.5), with any intention to emulate an institutional reform, even if the initiative comes from an international organisation, it

[330] OECD (n 19) 10–12
[331] OECD, 'Judicial Performance And Its Determinants: A Cross-Country Perspective' 6, 26–27 <http://www.oecd.org/eco/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf> accessed 1 March 2016

is indispensable to evaluate thoroughly the local needs, the prevailing informal institutions, and to ensure participation from local actors to reduce the risks of rejection.

2.4.2. THE WORLD BANK

The World Bank was created in 1944 with the aim of helping with reconstruction after the World War II. The main goal of the organisation today is to alleviate poverty worldwide. The World Bank acts as a cooperative with 188 member countries, which are represented by their ministers of finance or development. The organisation dispenses low-interest loans, zero to low-interest credits, and grants to developing countries.[332]

The World Bank uses the *Rule of Law* as a measure to grant assistance. However, the Bank has recognised that the concept does not have a fixed meaning.[333] Certainly, the existing literature regarding the definition of the rule of law is abundant and varied.[334] Nevertheless, a broad overview of the concept of the rule of law and of its development is necessary to understand the role of the World Bank in the dissemination of policies in developing countries. In this regard, the next part provides such an overview, with the recognition that a more in-depth analysis goes beyond the scope of this research project.

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[332] World Bank, <http://www.worldbank.org/en/about/leadership> accessed 2 March 2016

[333] World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html> accessed 14 March 2016

[334] So many definitions of the rule of law can be found that Matthew Stephenson has expressed that *"Rule of law has no meaning. Everyone uses the phrase because everyone can get behind it and might make it easier to get funding"*. It has been said also that *"The rule of law means whatever one wants it to mean. It is an empty vessel that everyone can fill up with their own vision*" (in M J Trebilcock and Ronald Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing Limited 2008) 13.

The emergence of the concept of the rule of law goes back to the 1960s, when the US Agency for International Development, along with some private American donors, promulgated a programme to reform the judicial systems and substantive laws of developing countries. The programme was known as "law and development" and its principle was that the law was the foundation for social change.[335]

Despite the efforts, the programme failed – mainly because the movement did not have well-developed theories to explain their choice of programmes and projects.[336] Also, it has been indicated that part of the failure rested on the fact that the reforms were given by foreign consultants who ignored the local realities and excluded the ways individual countries used to resolve their conflicts as the customary law.[337]

As a result, a new movement emerged to replace the failed law and development programme. This new movement, known as the rule of law, arose when the world was witnessing a globalisation phenomenon, where exports, free markets, privatisation and foreign investment were considered the keys to growth. Consequently, the first phase of the rule of law responded to this new era in that it considered that legal transplantations were appropriate, that reforms at all levels and at once were necessary, that one size fit all reforms, and that the top-down emphasis was correct.[338]

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[335] World Bank (n 333)
[336] David Trubek, 'The 'Rule Of Law' in Development Assistance: Past, Present and Future' in David M. Trubek and Alvaro Santos (eds), in *The New Law And Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 74–82
[337] World Bank (n 333)
[338] Trubek (n 336) 83–94

Nevertheless, a new approach emerged after the drastic effects of globalisation on the markets of developing economies became apparent. Such effects exhibited that transplants have some drawbacks, and that local needs are vital when considering changes. Also exposed was that the top-down approach was inaccurate, and that legal reforms need time and cannot be implemented abruptly.[339]

In relation to the judicial system, its effectiveness and independence has been considered as one of the pillars of the rule of law, in the belief that there is a correlation between economic development and institutional quality. The claim is that effective tribunals foster economic and social development.[340]

Regarding specialisation, the World Bank has produced a document that refers to specialised tribunal services, in which there is an analysis of the topic, and its origins and evolution. The text refers to indicators of when specialisation is recommended and the models that could be adopted. The conclusion of the document is that specialisation is not always the solution, and it offers an example of how this type of judiciary has been adopted by some jurisdictions simply to meet the requirements established by international organisations, rather than because it is appropriate.[341]

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[339] Ibid.
[340] United Nations, General Assembly, 'Strengthening and Coordinating United Nations Rule of Law Activities' (2013) A/68/213/Add.1, 5 – 6, numbers 27, 28, 29, <https://www.un.org/ruleoflaw/files/10471_SG%20Report%20-%20Rule%20of%20Law%20Activities%202013%20-%20A_68_213.pdf> accessed 20 March 2016; Palumbo, Giupponi, Nunziata and Mora-Sanguinetti (n 41) 5
[341] Gramckow and Walsh (n 209) 25

The example in question is the programme "Doing Business", designed by the World Bank, which produces annual reports that measure the business regulations of 189 countries. A total of 11 indicators are used to measure the performance, and one of those is how effectively contracts are enforced. Points are rewarded when the indicators are met and the totality of the points is used to rank the countries under examination.[342] Regarding the enforcement of contracts, the methodology of the programme has expressly established that when a country proves that a specialised commercial tribunal or a section solely for the hearing of commercial cases is in place, a score of 1.5 is dispensed.[343]

From the above analysis we can infer the following: i) that recipient jurisdictions are willing to adopt the policies suggested by donors; ii) that recipients make big efforts to accomplish the advocated policies; iii) that the imposed policies or programmes such as "Doing Business" remain debatable mainly because of the lack of empirical evidence proving their benefits; and iv) that one-size-fits-all transplants are still prevalent. In this sense, the possibility that the creation and institutional setting of the competition tribunal in Mexico has been the result of a transplant will provide a good opportunity to analyse how the transplantation has been carried out and to evaluate the reasons for its success or failure.

2.4.3. THE INTERNATIONAL COMPETITION NETWORK (ICN)

The ICN was launched in October 2001, with a mission to adopt superior standards and procedures in competition policy around the world by providing scenarios where the competition authorities discuss practical

[342] World Bank <http://www.doingbusiness.org/reports/global-reports/doing-business-2016> accessed 14 March 2016
[343] Ibid.

competition concerns, address them, and reach consensus on recommendations or best practices.[344]

In 2003, during the ICN annual conference, a report was provided in which one of the issues identified as a hurdle to implement competition law in developing countries was the judiciary. As a result, a project was designed to analyse the relationship between competition authorities and the judiciary; the Competition Policy Implementation Working Group: Sub group 3 was delegated to lead the project. A report was presented in April 2006 whose conclusions were taken mainly from a survey of 18 competition authorities around the world. The main findings of the report were that one of the reasons why injunctions are granted is because judges are not sufficiently familiar with economic concepts.[345]

Also, it was indicated that the most common reason as to why decisions are overturned is the divergences between the competition authorities and the judiciary when interpreting the competition rules. A constant concern among the 18 was the lack of economic knowledge amid the judiciary, which was stronger in developing countries. In that sense, the recommendation given by the ICN was to bring judges closer to the technical analysis made by the competition authorities, and to improve their mutual understanding.[346]

The project had a second phase, which reported during the 6th ICN annual conference in Moscow in 2007.[347] The purpose of this second phase was to improve the scope and quality of the interaction between

[344] <http://www.internationalcompetitionnetwork.org/members/member-directory.aspx> accessed 15 March 2016
[345] ICN (n 261)
[346] Ibid. 16
[347] Ibid. 1, 2, 17

competition agencies and the judiciary using the data and findings collected during the first phase and condensed in the report presented in 2006. This drew on the experiences of seven competition authorities.

One of the main findings was that the lack of economic knowledge among the judges remains as a strong concern among developing countries. At the same time, Brazil reported that the training provided by the competition authority to judges was not effective. Based on the findings, one of the conclusions of the report was that the initiative to train judges should come from developing countries, and that regardless of the existence of specialised tribunals or the institutional setting, the keys to success rest on the interaction between the competition authorities and the judiciary.[348]

In June 2011, the ICN started a project working with tribunals and judges, after considering how vital the review process is. One of the goals of the project was to examine the issues of cooperation and identify realistic ways in which agencies can improve their cooperation with the judiciary, by, for instance, giving some tips to the competition authorities about how to make their decisions easier to understand, particularly to non-specialised judges.[349]

Finally, the Advocacy Working Group during the 14th ICN annual conference in Sydney in 2015 offered a report about the competition culture project. The report began by referencing a report prepared by the Advocacy Group in 2002, which showed that competition culture was

[348] Ibid. 17, 19

[349] ICN, 'Project on Working with Courts and Judges' (2011) 1, 2, 3 <https://www.internationalcompetitionnetwork.org/uploads/library/doc796.pdf> accessed 20 March 2016

seen as weaker where tribunals were inexperienced with competition matters and strong where there were specialist competition tribunals. In relation to the judiciary, the report stated that poor understanding of competition law leads to incorrect decisions and that when parties intentionally use complicated economic evidence, judges do not feel confident and are then hesitant to dismiss appeals. The report also indicated that specialist tribunals are perceived as better placed to deal with competition law and economics, as well as to be an instrument that may improve the competition culture among judges.[350]

The work that the ICN has undertaken to improve the interaction between the judiciary and the competition agencies is valuable. At the same time, even if there is no evidence that the adoption of specialised tribunals in competition cases has been recommended by the ICN as an organisation, its reports and surveys have contributed to demonstrate that competition agencies in developing countries perceive the lack of competition knowledge and economics amid the judiciary as a hurdle. Courts are perceived as an obstacle because they have wrongly granted injunctions or wrongly (and often) overturned the decisions made by the competition authorities. This circumstance explains why under the presumption that specialists have a good understanding of competition rules and economic principles, competition authorities consider that specialisation may mitigate such a hurdle by lowering the number of decisions wrongly overturned or injunctions wrongly granted.

[350] A survey was undertaken to examine the conclusions of the report. A total of 49 competition agencies took part in it. Regarding the existence of specialist judges or specialist courts for competition cases, 25 countries indicated that they have this type of judiciary and all of them reported that they believed that specialist tribunals improve the speed and the quality of judicial decision in competition cases. ICN (n 260) 3, 4, 14, 15.

2.4.4. CONCLUDING REMARKS

It is evident that international organisations such as the OECD, World Bank and the ICN have made efforts to both analyse and give recommendations to improve the judiciary system. In relation to specialised judges in competition law, the recommendations given by the OECD to developing countries in Latin America have been clear and regular.

We have observed that competition agencies in developing countries feel that specialised tribunals improve the speed and quality of the judicial review process, and therefore outcomes of this research could be used as a benchmark and framework by Latin American countries facing implementation issues derived from the judiciary being an obstacle.

2.5. CONCLUSIONS

The analysis presented in Section 2.1 outlined the uncertainty surrounding the benefits and drawbacks of specialised tribunals, namely efficiency, quality, uniformity and loss of independence, mainly because of the insufficiency of conclusive studies. At the same time, it described the existing disparity among scholars regarding the advisability of this type of judiciary, which has been reinforced by the scarcity of empirical evidence.

Section 2.2 concluded that, according to Legomsky's theoretical framework, specialisation is appropriate in competition law considering that this discipline is characterised by speed, dynamism and room for discretion. In relation to the complexity factor, this section advanced the

topic by establishing that among scholars the matters is still debatable. It has been seen that some scholars and competition agencies consider that the complexity of the field mainly derives from the predominant use of economics, a circumstance that worsens the performance of the judiciary due to a lack of knowledge, and which has been translated into a preference to solve antitrust cases based on procedural issues.

Regarding the appropriateness of adopting specialised competition tribunals in developing countries, Section 2.3 exposed how disputable the topic is. The divergence resides in the claim that it would be prudent for developing countries to invest their scarce resources in combating unequivocal anticompetitive conducts such as cartels, which have a bigger impact on their citizens, and avoiding the investigation of complex and expensive behaviours. Conversely, the argument is that specialised competition tribunals are necessary in developing countries to help establish their new regimes, to strengthen a culture of competition, and to make these regimes more enforceable.

In relation to international organisations, Section 2.4 has revealed that such organisations have influenced the adoption of this type of judiciary, either by giving specific recommendations or by allowing spaces where competition authorities express their concerns and thoughts about this topic. Section 2.4 has also underlined that developing countries are willing to adopt the recommendations given by these international organisations, especially when there is a donor–recipient relationship. The next chapter will focus on the specific conditions of Mexico.

CHAPTER 3

Mexico: markets, judiciary, and competition regime

INTRODUCTION

Chapter 1 of this thesis reviewed the theoretical framework of "transplants of institutions", aiming to explore whether the adoption of specialised competition tribunals in Latin American countries is advisable using Mexico as a case study. It revealed the complexity of such a phenomenon, and the importance of having a good understanding of it. Chapter 1 also focused on the commonalities among Latin American countries, setting the scene for further deliberation about the appropriateness of Mexico as a case study, and the suitability of mirroring the introduction of such an institutional reform.

Chapter 2 progressed the analysis by focusing on the scarcity of empirical evidence about the benefits and drawbacks of specialised tribunals, as well as by outlining the theoretical insights into the necessity of specialised tribunals in competition law, specifically in developing countries. In light of the groundwork presented in Chapters 1 and 2, we now turn to the empirical component of this research and explore Mexico as a case study.

The purposes of this chapter are first to explore why Mexico is a comprehensive case by analysing in detail certain aspects that are also experienced by some other Latin American countries, and which imply that the findings of this research project could be applicable to them; second to understand the reasons why a specialised competition tribunal

was adopted in Mexico, and third to provide sufficient background to assess more accurately the performance of such a tribunal.

This chapter therefore highlights the most important domestic legal and economic conditions that make of Mexico a representative example for other Latin American countries considering the adoption of a specialised competition tribunal. It also evaluates the functioning of the judiciary, a branch depicted as inefficient, untrustworthy, and incapable of dealing with an excessive volume of cases, and explains why a specialised competition tribunal was in a position to address such problems. And finally, seeking to set the context and highlight why the adoption of such an institution was imperative, it presents the trajectory of the Mexican competition regime, discusses the obstacles to its implementation, and gives a brief overview of the process that led to the adoption of this tribunal.

With a view to demonstrating why such institutional reform was required in Mexico, the structure of this chapter starts with a macro-level analysis which offers a historical overview of the Mexican markets in an attempt to visualise how challenging these markets are, and to show how the dominance of the executive and its involvement in the functioning of the markets impeded the development of competition principles. It is argued herein that the adoption of a specialised court would progressively aid in the development of such principles through effectively controlling the decisions adopted by nascent administrative agencies entrusted with strong powers, and improving the competition culture by providing judicial review decisions that gave the public a sense that the rules affecting market transactions were being applied efficiently and transparently.

Departing from the complex network of relations in the application of competition principles between competition agencies and the courts, the focus then moves to the judiciary. Given the interplay between agencies and courts, the argument is that judicial review may affect the effectiveness of the agencies if their decisions are wrongly overturned or if the decisions are not consistent; and deterrence goals are negatively impacted if sanctions are diminished without justification.[351]

In this sense, the analysis focuses on the Mexican judiciary, starting with a description of its structure, examining the different selection processes used to choose its members, and exploring the severe challenges that the judiciary faces such as lack of independence, corruption, and workload. The purpose of this analysis is to show how the judiciary in Mexico interfered with enforcement activities, and how challenging it was for a generalist judge in Mexico to deal appropriately with antitrust cases.

The next goal is to explore at a micro-level the circumstances that surrounded the adoption of the specialised competition tribunal. This narrow analysis aims to offer a comprehensive view to better understand the introduction of such institutional reform. This analysis begins by examining the development of the competition law regime in Mexico, and the development of its competition authorities. Then, it explores the features of the old review process of antitrust cases, and its challenges. Next it moves on to investigate the initiative of adopting a specialised competition tribunal, and the debates that such an initiative generated inside the parliament. Finally, it describes the design of the specialised

[351] Ioannis Lianos, Frederic Jenny, Florian Wagner von Papp, Evgenia Motchenkova, and Eric David, 'Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective' (2014) CLES Research paper series 4, UCL Faculty of Laws: London, 10

competition tribunal, and concludes by giving an overview of the new review process under the institutional reform.

This micro-level analysis suggests that the judiciary in Mexico was an impediment in the implementation of competition law. The fact that almost every intermediate and final decision made by the competition authority was challenged using an *amparo* action (see Section 3.2.2 for an explanation of this term), that almost all the challenged actions were suspended, that the majority of the judicial decisions were grounded on procedural failures, and that the competition authority had to conform their decisions to the judicial verdicts, contradictory in some cases, turned the competition authority into a weak body, and the competition law into an ineffective statute.

At the same time, the analysis highlights the lack of scrutiny of such institutional reform inside the Mexican parliament, outlines the importance of having constitutionally reformed the review process of antitrust cases, and the description of the institutional design, and offers a perspective on the advantages and shortcomings of this specialised tribunal, which will inform its assessment.

The present chapter is structured as follows. Section 3.1 explores the most important events in the history of the Mexican markets related to the scope of this research. Section 3.2 covers aspects related to the judiciary – such as structure, selection process, the *amparo* action – and examines the main problems that the judiciary in Mexico experiences. Section 3.3 studies the Mexican competition regime. Section 3.3 has two sub-sections. The first studies the competition law regime in Mexico and its

development. The second examines the development of the competition authorities in Mexico.

Section 3.4 presents the obstacles that impeded the implementation of competition law in Mexico, and ascertains the reasons why a new review process under a specialised competition tribunal was sought as a solution. Section 3.4 adopts the following structure: a) overuse of *amparo* actions, b) the tax court that became another review instance; c) confirmation of fines; d) quality of the review decisions. It examines why a specialised competition tribunal was created, how the specialised competition tribunal was designed, and presents an overview of the review process before the specialised competition tribunal. Concluding remarks are provided at the end of every section.

3.1. THE ECONOMIC, SOCIAL AND POLITICAL CONDITIONS THAT SHAPED THE MEXICAN MARKETS

As Douglass C. North has asserted: "*history matters*".[352] Considering that the main purpose of this research project is to assess the performance of the specialised competition tribunal in Mexico, such evaluation will not be accurate without an overview of the evolution of Mexican economic policies. For this reason, this first section broadly explores the background required to understand the reasons that provoked the slow development of the competition regime in Mexico, the low levels of enforcement, the difficulties that made necessary the adoption of a specialised competition tribunal, and the significance of having adopted such an institutional reform.

[352] North (n 23) 100–104

An understanding of the historical background also sheds light on the nature of the hurdle, in this case, the conflict between the goals of governments and competition principles. Such analysis also helps to determine the magnitude of the issue – this is a judiciary subordinated to the executive, overloaded, unreliable and untrained in competition law. This brief overview also explains why a specialised competition tribunal was required in Mexico, and offers other Latin American countries afflicted by the same issues the opportunity to learn from the Mexican experience and to use it to try to remedy them.

In particular, this section highlights key historical events that impacted the development of the Mexican markets. First, the "Porfiriato", when Mexico joined the international markets, developed its infrastructures, but also increased its levels of inequality. Second, the "Revolution of 1910", when Mexico closed its borders, adopted an import substitution model, and the government became the ruler of the markets. This market structure led to "the crisis of the 1980s", as it was impossible to sustain the adopted import substitution model.

The 1980s crisis was followed by the "globalisation" era, when Mexico opened its borders, joined the international markets, privatised an significant number of governmental enterprises, and where the government played a less important role. This open market structure was envisaged as a way to overcome the crisis of the 1980s, but as Mexico was not prepared to compete at an international level in a global market, linked with an unprecedented and poorly analysed privatisation process, another crisis arose in 1994 ("the 1944 crisis").

At none of these stages was the implementation of the Mexican competition regime a substantial part of the governmental programmes. On the contrary, the encouragement and protection given by the government to monopolised enterprises was predominant. Also, the role played by the government in controlling prices and barriers was seen as normal. It is only when Mexico joins NAFTA that the globalisation process starts and Mexico is compelled to adopt a competition regime. Until this moment, the lack of competition culture was evident, as was the lack of government interest in maximising the efficiency of competition principles. Next, each stage is examined in turn.

a. The "Porfiriato"

In 1876 General Porfirio Díaz came to power. His ideal was to protect the country's few rich people, expecting that their progress would impact positively on everyone.[353] The *Porfiriato* provided Mexico's first and longest period of economic development and reinserted it into the international market. During his governance a law regime gave certainty to investors,[354] and strengthened infrastructures.[355] There was economic development during this time, but it did not reach everyone,[356] and this circumstance led to the Revolution of 1910.[357]

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[353] Arnaldo Cordova, *La ideología de la Revolución Mexicana. La Formación del Nuevo Régimen* (Ediciones Era S A de C V 1973) 16–18

[354] During this period the Civil, Criminal, and Commerce statutes were created. See Luis Rubio and others, *A la Puerta de la Ley. El Estado de Derecho en México* (1st edn Cal y Arena 1994) 166.

[355] Rolando Cordera and Leonardo Lomeli, *La Modernización de la Economía Política Mexicana: Las Aventuras de la Globalización Neoliberal* (UNAM 2009) 7, 8

[356] Ibid.

[357] Maria del Refugio Gonzalez explains how the exclusion of a significant number of the population from the "National Project"; the extended power of the Executive; the development of the economy benefiting just the small wealthy groups; and the sacrifice of the individual rights in favour of the progress, were the elements that inspired the revolution. See Maria del Refugio González, 'Las transiciones jurídicas en México del Siglo XIX a la revolución' in *Transiciones y diseños institucionales* (UNAM 2000) 127–128.

b. The Revolution of 1910

Although in 1910 there was a revolution, there was no consensus within it about the reforms that were needed, where the needs of the industry were strengthened and those of farmers forgotten.[358] At the same time, Mexico was feeling threatened by the big economies, particularly the US, and for that reason a *protectionism* period started where a model of import substitution was pursued. Thus, Mexico became centralised, and a significant process of nationalisation and expropriation was initiated.[359]

During this *protectionism* period, Mexico closed its borders, and government played a very active role in the economy by controlling prices,[360] controlling distribution, exempting local business from paying taxes, or subsidising them.[361] This over-protection created markets where it was not necessary to compete, with the result that at an international level Mexican industry was unable to participate.[362]

The level of intervention included the use of resources to buy local industries near to bankruptcy, the funds for which were taken from the profits left by the oil market. But once the price of the oil fell, the period of the *Mexican Miracle* came to an end leaving Mexico confronted with the crisis of the 1980s.[363] Until then, it had been almost impossible to

[358] Cordera (n 355) 9; Jazmin Monroy, 'Plan Puebla-Panamá como estrategia ante el atraso en el sureste Mexicano' (Thesis, Universidad de las Américas Puebla 2003) 2
[359] Sergio Garcia-Rodriguez, 'Mexico's Decades of Statist Economy Policy' (1995) 44 Depaul Law Review, 1151
[360] In 1950 a law was enacted concerning the attributions of the Executive, according to which the government was allowed to fix the prices of an important range of goods and services.
[361] Francisco Gil and Arturo Fernández, *El Efecto de la regulación en algunos sectores de la economía Mexicana. Capítulo 3. La regulación y la política de competencia* (ITAM 1991) 3; Cristina Puga and David Torres, *México La Modernización Contradictoria* (1st edn Editorial Alhambra Mexicana 1995) 24–25
[362] Cordera and Lomeli (n 355) 3–5; Puga and Torres (n 361) 27–28
[363] Garcia-Rodriguez (n 359) 1154; Puga and Torres (n 361) 30–31

envisage the adoption of a specialised competition tribunal, but some new circumstances were about to shape a transformation process, as the next part shows.

c. The crisis of the 1980s

Since the 1970s the Mexican economy had been in slump, and therefore some small measures were taken to remedy this, such as a reduction of the amount spent on protecting local business, and some timid attempts to open the market.[364] Nonetheless, such measures were insufficient, and the devastating effects of this economic protectionism were seen in 1982, when the country could not depend on oil revenues anymore and officially had to declare its inability to pay its external debt for three months.[365] Mexico had to leave the exchange market[366] and face its toughest economic depression, characterised by uncontrollable inflation, capital flight, and uncontainable foreign debt.[367]

The main goal of the government was to pay the foreign debt, offering citizens two years of severe adjustment, two years of macroeconomic stability, and finally two years of speedy development.[368] However, Mexico only went through the first stage of the plan.[369] A new policy was then required to stimulate the economy. Mexico moved from an import

[364] Sergio López-Ayllón and Héctor Fix-Fierro, *Tan Cerca, Tan Lejos! Estado de Derecho y Cambio Jurídico en México (1970–1999)* (UNAM 2000) 509
[365] Rolando Cordera and Leonardo Lomelí, 'El papel de las ideas en el cambio estructural en México (1982–2005): un balance preliminar' (2006) XXIX Economía 57–58, 197; Gustavo Vega, *'*La Política Comercial de México en el Sexenio 1994–2000: Crisis Financiera y Recuperación Económica*'* en *Entre la Globalización y la Dependencia* (1s[t] edn Tecnológico de Monterrey 2002) 103
[366] Cordera and Lomeli (n 355) 14
[367] Garcia-Rodriguez (n 359) 1154
[368] This programme was named "PIRE" (Immediate Program of Economic Reorganisation), shaped by the conditions that the FMI imposed to renegotiate the foreign debt, such as bureaucratic cuts, gradual reprivatisation of the banks, and the reduction of public spending among others. See Monroy (n 358) 7; Puga and Torres (n 361) 32–33.
[369] Cordera and Lomeli (n 365) 199.

substitution to a free market model, where a process of privatisation of enterprises owned by the government and the deregulation of the market was imposed. Statistically, Mexico in a period of eight years divested almost 900 of the 1,155 entities owned by the government, reduced the import fees by almost eliminating the authorisation to import, and signed the General Agreement on Tariffs and Trade ("GATT").[370] This change shows how the Mexican government progressively contemplated a different approach towards competition principles.

d. Globalisation

During the 1980s the most advanced global ideology took place across the world. It was known as the "Washington Consensus".[371] This ideology was grounded, among other things, on premises such as external investment, openness, privatisation and liberal economic policies.[372] In Mexico, the privatisation process was adopted by President Carlos Salinas de Gortari with a "*strange sense of ownership*",[373] translated into the enactment of a foreign investment law which allowed overseas companies to acquire 100% ownership of Mexican companies,[374] as well as a national economic plan aimed at enhancing the role of the private

[370] Garcia-Rodriguez (n 359) 1154–1155; Cordera and Lomeli (n 365) 204
[371] The Washington consensus was the result of the core views of the US congress, senior members of the US administration, senior members of the international financial institutions, members of the economic agencies of the US government, the Federal Reserve Board, the International Monetary Fund, the World Bank, and the think-tanks. See J Williamson, 'The Progress of Policy Reform in Latin America, Policy Analysis in International Economics' (1990) 28 Institute for International Economics, 9.
[372] Burki Javed and Guillermo Perry, 'Mas allá del consenso de Washington. La Hora de la Reforma Institucional' (1998) Washington – Banco Mundial, 8
[373] Cordera and Lomeli (n 355) 2; Cordera and Lomeli (n 365) 207
[374] Foreign Investment Law (Ley de Inversión Extranjera), D. O., Dec., 27, 1993

sector.[375] Hence, economic areas that were the province of the public sector were transferred for the first time to the private.[376]

The globalisation era brought devastating consequences to the Latin American countries, and Mexico was not the exception.[377] In terms of investment, the private sector did not occupy the place left by the public sector either. Mexico became dependent on commodity exports; its exports increased[378] as well as its levels of poverty[379] and inequality.[380] This globalisation era was a cornerstone step towards free markets, with less intervention from the Mexican government. At the same time, such change seems to have been overwhelmingly responsible for the situation that led to the next crisis.

e. The 1994 crisis

The 1994 crisis was a combination of different factors. One was the signing in November 1993 of the North American Free Trade Agreement (NAFTA) by the governments of the United States, Mexico and Canada.

[375] National Development Plan (Plan Nacional de Desarrollo 1989–1994), D. O. May 31, 1989

[376] By 1993 just 213 enterprises were owned by the government compared to the 1,155 owned in 1982. See Monroy (n 358) 11. The magnitude of the privatisation process was so significant during the presidency of Salinas that the *New York Times* reported it as 'The Overselling of Carlos Salinas' (*New York Times*, 24 February 1996, 20).

[377] Some authors have referred to this globalisation era in Latin America as *"The Lost Decade"* or *"The Perfect Crime"*. See William Robinson, 'Global Crisis and Latin America' (2004) 23 Bulletin of Latin American Research 2, 137, 138; James Galbraith, *A Perfect Crime: Global Inequality* (Daedalus Cambridge 2002) 25.

[378] In Mexico the levels of exports increased from $3 billion in 1975 to $34.5 billion in 1994. In particular, the vehicle industry has become an important export sector. Aaron Tornell and Gerardo Esquivel, 'The Political Economy of Mexico's Entry into NAFTA' (1997) 6 University of Chicago Press, 31, 36.

[379] The percentage of population in Mexico in 1998 living below $2 Per Day (Poverty) increased by 40%, and $1 Per Day (Indigence) increased by 14.9%. See World Bank, 'World Development Indicators' (1998) Washington D. C., table 2. 7.

[380] The richest 10% of the urban population in Mexico increased its share of income from 26% to 34% (1984–1996). Statistics given by the ECLAC, 'Social Panorama of Latin America' (1998) Santiago, Chile, United Nations, table II.1, 64.

NAFTA's focus was on financial liberalisation,[381] which created great expectations among investors, representing for Mexico an increase of external credit inflows from $193 million in 1988 to $23.2 billion in 1993.[382] The recently privatised banks in Mexico used this capital primarily to confer consumer credit and mortgage loans, with a consumer credit increase of 457.7% between 1987 and 1994, and of 966.4% on mortgage loans during the same period.[383]

Two more elements triggered the crisis: the decision made by the Mexican government to keep a semi-fixed exchange rate,[384] and increased US interest rates. These two economic policies, combined with unregulated banks conferring venturous and numerous credits, and the army insurrection in Chiapas following the assassination of the Secretary of the Institutional Revolutionary Party (PRI) – the party that had ruled for more than 70 years – created serious concerns among the investors who finally left the market.[385] Mexico then faced one of the worst financial crises in its history.[386]

For the purpose of this thesis, and given the typical development of the markets through history, two important things could be highlighted. Firstly, it is remarkable that Mexico ended up adopting a specialised

[381] Robin Broad, 'The Washington Consensus Meets the Global Backlash: Shifting Debates and Policies' (2004) 1 American University, Washington D. C. 2, 133, 138
[382] Gil and Fernandez (n 361) 307
[383] Roberto Orro, 'La Crisis Financiera en México: Lecciones Para Cuba' (1998) 8 Cuba in Transition, Association for the Study of the Cuban Economy, 307
[384] The goal of the policy was to control inflation by pegging the peso to the dollar, and to offer credibility to investors and citizens. The measure apparently succeeded, when in September 1994 Mexico achieved an inflation of 6.7% after showing a peak of 180% in February 1988. But this short-term control relief was unsustainable and at some point the peso was allowed to float resulting in high exchange and interest rates, as James Meigs has explained, 'Mexico Monetary Lessons' (1997) 17 Cato Journal 1, 38, 66, 67.
[385] William Lovett, 'Lessons from the Recent Peso Crisis in Mexico' (1996) 4 Tulane J. of International and Comparative Law, 153; Puga and Torres (n 361) 40–41
[386] Gil and Fernandez (n 361) 311–312

competition tribunal after going through decades of governmental policies which disregarded competition principles. This suggests that any other Latin American country with a similar background could also made important efforts in an attempt to embrace competition as Mexico did. Secondly, as explored in Chapter 1, the introduction of reforms or policies should be a thorough and progressive process where local needs must be carefully scrutinised and implemented, including the lessons provided by this research project, to avoid the levels of rejection shown earlier.

3.1.1. CONCLUDING REMARKS

The events described in Section 3.1 had a significant impact on the delineation and functioning of the Mexican markets. First, the geographic closeness with the US has in some periods has generated an incentive to strengthen the trade between them, as it was the case during the *Porfiriato* or the *globalisation* era, and in others has constituted a threat resulting in closed markets, as was the case during *protectionism*.

Second, the rule of the PRI for more than six decades has signified for this party a concentration of power in the hands of the president who represents it, with subsequent wide market control. Third, the active role that the government has played in the Mexican economy, derived mainly from the concentration of power in the hands of the executive branch, has meant a high state involvement in the economy via the control of prices, subsidising local business, nationalising and privatising enterprises, as well as regulating or deregulating markets. Such involvement represented a poor advancement of the Mexican competition regime because the

goals of the government were not aligned with the objectives of competition policy.

Fourth, the adoption of policies without considering the specific needs and conditions of the Mexican markets, as was the case in the globalisation era with measures such as privatisation of entities, trade liberalisation or financial liberalisation, resulted in socio-economic crises whose effects have been difficult to reverse. Fifth, the implementation of economic policies to alleviate the immediate effects of the different crises that for decades Mexico has faced has not been consistent or thought through in the long-term.

The combination of all these factors reveals a government unwilling to maximise the efficiency of competition policy, and face the challenges that the Mexican markets offer. At this point in Mexico's history, it was difficult to envisage significant reforms to enhance the competition regime, such as the adoption of a specialised competition tribunal, and yet it happened; therefore, this example could be used as a benchmark by some other Latin American countries willing to make efforts in the same direction. Section 3.2 explores how the judiciary in Mexico is structured, and how it operates, with a view to providing the necessary background for an appreciation of the impact of having adopted a specialised competition tribunal, and to comprehensively assess its performance.

3.2. THE MEXICAN JUDICIARY

The first goal of this section is to present the structure of the judiciary in Mexico, and the functions that are assumed by this branch. The general presentation of the structure of the judiciary facilitates the development

of further analysis about the obstacles that the judiciary in Mexico faces, and why the creation of a specialised competition tribunal was considered as a suitable reform to overcome some of them.

The second goal is to examine the selection process to designate the members of the tribunals and the judges, and the trajectory of the judicial career in Mexico. The examination of these factors highlights the transition that the Mexican judicial career experienced, starting with a tutorial model (1917–1982) before moving to a more cooperative model (1983–1994) and finally a more meritorious model (1994–present).

In the tutorial model new judges or magistrates were selected by the Magistrates of the Supreme Court, working closely for them, and learning from them. This tutorial model has been criticised for on some occasions allowing the perpetuation of a closed mentality among the members of the judiciary.

Then a cooperative model took place when a high number of vacancies had to be fulfilled. The main distinction from the tutorial model was that the Magistrates of the Supreme Court exchanged their votes to support their own candidates. Finally, in 1994 the Federal Judicature Council (*Consejo de la Judicatura Federal* – hereinafter CJF) was created to administer the career of the members of the judiciary through a more detailed meritorious process.

The examination of the development of the judicial career establishes that the different training models had benefits and shortfalls. The fact that under the tutorial and cooperative models learners had to shadow and copy their mentors meant that important skills and vast areas of

knowledge were passed from generation to generation, and this represents an important benefit. Nonetheless, features such as closed minds or unwillingness to assume new challenges were eventually passed on too, and this has been identified as a major shortfall.

Given that the competition regime was a novelty in Mexico, and considering that amid the judiciary knowledge was passed from generation to generation, the value of discussing the selection process is to provoke some inferences about a possible resistance to acquire knowledge from sources other than the mentor. Additionally, it helps appreciate why this situation perhaps reinforced a lack of competition culture within the judiciary, which, in turn, could have impacted the quality of the review decisions.

The above analysis fits within the narrative of this thesis in its attempt to identify the nature of the issues and their magnitude, and to explain why the adoption of a specialised competition tribunal was necessary. Section 3.2.1 offers a specific analysis about the selection process of the members of the Mexican specialised competition tribunal.

The third goal of this section is to explore the main problems that the Mexican judiciary experiences, particularly, the dominance of the executive branch, which has diminished the independence of the judiciary. This dominance has also been reflected in the legislative branch, by the constant creation or reform of the Constitution and the laws at its convenience, making it difficult for judges to apply the law, which on some occasions has been contradictory or difficult to track.

Corruption has also affected the credibility of the judiciary. Finally, the heavy workload has compromised the quality of the decisions. The aim of presenting these issues is to offer a background that helps to understand why the review process of antitrust cases might not have been an easy task for the judiciary. Section 3.3 advances the analysis of how the adoption of a specialised competition tribunal was envisaged to tackle such issues.

3.2.1. STRUCTURE

According to Chapter IV of the *Constitución Política de los Estados Unidos Mexicanos*, hereafter the Constitution, the judiciary or *Poder Judicial de la Federación* is responsible for preserving the supremacy of the Constitution over the rest of the legal system. Different actions have been created for this purpose, such as the unconstitutional action, the constitutional controversies action, the *amparo* action, and the jurisdictional controversies in electoral matters.[387]

The judiciary is also responsible for solving controversies between private parties, or between private parties and the federal authorities; for solving controversies created by acts or laws that violate individual rights; for protecting persons against the abuse of the authorities; and for solving competence conflicts among the executive, the legislative, and the judiciary powers.

The judiciary or *Poder Judicial de la Federación* is composed as follows:[388]

[387] See articles 105, 103, 107, 97, 99 of the Constitution, respectively
[388] See article 94 of the Constitution

- Supreme Court: seven members
- Electoral Tribunal: seven members
- Unitary Tribunals: one member per tribunal
- Collegiate Circuit Courts: three members per court
- District Judges: one judge
- Federal Judicature Council (CJF): administrates the career of the members of the judicial federation power, excluding the Supreme Court and the electoral tribunal

The next part of this section studies the designation of the collective circuit tribunals and the district judges. It also examines the methods that have been used to select them, and how this selection has impacted the performance of the judiciary in Mexico.

a. Selection process

For many decades, the designation and promotion of judges and members of tribunals in Mexico was the responsibility of the plenary of the Supreme Court.[389] Different rules have been applied since the Constitution of 1917, during which tenure has varied from four to six years, or been for indefinite periods. The rules have also allowed the demotion of judges by the President of the Republic under different procedures, until in 1982 the referred-to faculty was abolished.[390]

It was in 1994 that a judicial career was formally established in Mexico with the creation of the CJF. Until then, two models of selection process

[389] See article 97 of the Constitution, and the organic law of 2nd November 1917
[390] Jose Cossio, 'Jurisdicción Federal y Carrera Judicial en México' in *Cuadernos Para La Reforma de la Justicia 4* (UNAM 1996) 46

were used: i) the "tutorial model" from 1917 to 1982, and, ii) the "cooperative model", from 1983 to 1994. Under the tutorial model, the respective member of the Supreme Court proposed a candidate, who worked closely for them, usually as a secretary. The time during which the candidate and the minister worked together was seen as a training process, where the minister became a tutor. For that reason this model is known as "tutorial".[391]

In 1983 the tutorial model had to be replaced due to the significant number of judicial places that were created that year, a trend that continued until the 2000s. It has been indicated that on average 35 new places were occupied per year. The cooperative model consisted of every minister of the Supreme Court having a candidate, by which alliances among the rest of the plenary were necessary to make the candidacies successful. This selection process based on an interchange of votes was known as the "cooperative" model.[392]

The significant number of new judicial places to be occupied forced the consideration of a proper career system. It has been indicated that between the 1980s and the 2000s around 1,700 places were created, exceeding the number of places created between 1825, the year when the judiciary system was established, and 1983.[393] Thus, in December 1994 the CJF was created.[394] The objective of the legislator when creating the above-mentioned body was to ensure a judicial career based on five principles: excellence, objectivity, impartiality, professionalism, and

[391] Ibid. 52, 53
[392] Ibid. 61, 63
[393] Julio Bustillos, 'Los Jueces Federales en México: antes y después de la carrera judicial' (2010) Revista del Instituto de la Judicatura Federal, 35
[394] Article 100 of the Constitution was modified. See Diario Oficial de la Federación 31 December 1994

independence. At the same time, the function of administering, invigilating and disciplining the judiciary was referred to the new body,[395] with the aim of allowing the members of the Supreme Court to focus purely on making judicial decisions.

The process to select the magisters can be closed or open, and to select the judges it is open. When the CJF announces publicly in the newspapers that a selection process is open, those interested take a knowledge exam. The participants with the best scores are interviewed, and after analysing the outcomes of the interviews, together with the candidates' respective publications, legal career, and professional accomplishments, the best profiles are selected to perform as judges.[396]

The creation of the CJF has been received with optimism among scholars, as its creation has aimed to mitigate part of the problems that the judiciary faces. So far, an improvement has been seen in terms of the selection process of the members of the judiciary, as a meritorious process has replaced the old-fashioned tutorial and cooperative models. The next part studies the *amparo* action. This is a particular legal tool in Mexico, which needs to be understood as its use has negatively impacted the performance of the Mexican judiciary, particularly in terms of quality and efficiency, and has compromised the development of Mexican competition law. Such analysis also serves to understand why the adoption of a specialised competition tribunal was envisaged to try to remedy the above issues and why a constitutional reform was required to limit its use in antitrust cases to final decisions.

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[395] Cipriano Gomez, Alberto Said and Valeriano Perez, *Los Consejos de la Judicatura y la Carrera Judicial* (Honduras: Graficentro Editores 1999) 57, 58

[396] Article 114 Ley Orgánica del Poder Judicial de la Federación. Diario Oficial de la Federación 26 May 1995

3.2.2. THE *AMPARO* ACTION

The analysis of the *amparo* action fits within the narrative of this thesis because the judicial review of the decisions adopted by the Mexican competition authorities is initiated through this legal action. Section 3.4.1 will describe the use of the *amparo* action in antitrust cases in more detail and highlight how the use of this legal tool negatively impacted the functioning of the Mexican competition authority and the judiciary, forcing the adoption of a specialised competition tribunal in Mexico. For now, this section presents a general description of the *amparo* action, which is necessary to appreciate the implications of its use, discussed later in the chapter.

The *amparo* action is a legal tool proclaimed to safeguard constitutionally protected rights from arbitrary acts of government bodies or unfair laws in individual cases.[397] Its origin was rooted in external and internal factors – externally, *habeas corpus* in the US, and the human rights declaration in France; internally, the desire to establish a constitutional defence aimed at preserving human rights.[398] This defence limits the protection to the individual case in question, without creating future precedent or extending the effects of such a decision to other potential parties,[399] and without a pronouncement about the unjust act or the unfair law.[400]

[397] Michael Taylor, 'Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch' (1997) 27 New Mexico Law Review, 151
[398] Gonzalez (n 357) 111–112
[399] Taylor (n 397) 151
[400] This reform is known as "the Otero formula", honouring Mariano Otero who inspired the scope of the *amparo* action, which is still applicable these days. See Gonzalez (n 357) 113.

Sections VIII and IX of Article 103 of the Constitution of 1917 introduced an important reform to the *amparo* action by establishing two different categories of *amparo* action: i) direct; and ii) indirect. The direct *amparo* was decided by the Supreme Court in a single instance,[401] and the indirect *amparo* was decided by district courts and subject to review by the Supreme Court.[402]

In 1936 an *amparo* law was enacted, and reformed several times since then.[403] This *amparo* law established two scenarios when the action is admissible: first, the *amparo* against laws that violate guarantees,[404] and second, the *amparo* known as cassation consisting of a judicial review[405] in the hands of the Supreme Court and the newly created Collegiate Circuit Courts.[406]

In terms of procedure, in both cases the complaint is presented in writing, to concrete cases, by petition of an individual.[407] In direct *amparo* the complaint is presented to the responsible authority that sends it to the Collegiate Circuit Court.[408] In indirect *amparo* the complaint is presented directly to the district courts.[409]

In general, the stages in the trial of indirect *amparo* are: 1) the examination of admissibility of the plaintiff by the district court; 2) the

[401] Richard Baker, 'Judicial Review in Mexico: A Study of the Amparo Suit' (1971) Institute of Latin American Studies, University of Texas Press, 49
[402] Ibid 49–50, 224. An example of a case when the indirect *amparo* action is admissible could be the violation of a procedural law depriving the complainant of defence.
[403] The last reform has been introduced in April 2013, DOF 2 April 2013.
[404] Section I, article 103 of the 1917 Constitution, and section I, article 1 of the *amparo* Law
[405] Baker (n 401) 175–176
[406] Baker (n 401), 198. Article 34 of the *Amparo* Law of 2013 established that the collegial circuit tribunals have jurisdiction in direct *amparo*, while article 40 established that the Supreme Court would attract jurisdiction in direct *amparo* just in relevant cases.
[407] Amparo Law of 2013, articles 108 and 175, respectively.
[408] Amparo Law of 2013, articles 176, 177, 178
[409] Amparo Law of 2013, articles 112, 113

submission of preliminary answers by the responsible authorities; and, 3) a public hearing.[410] The stages of the trial in direct *amparo* are: 1) the admissibility review by the Collegiate Circuit Court, or by the Supreme Court; 2) the assignation of the plaintiff to one of the members of the Court; and, 3) the presentation of the decision draft which will be considered and voted on by all members of the chamber.[411]

The effects of the *amparo* decision are to re-establish the enjoyment of the impaired constitutional rights of the complainant, by which the judgment will refer solely to the terms of the plaintiff, without making any general pronouncements about the law or the act complained of.[412] The Supreme Court has also indicated that the *amparo* judgment cannot replace the decisions subject to review.[413]

There have been a number of objections to the *amparo* action. First, the efficacy of the *amparo* action has been questioned mainly because of its limits. In terms of the most significant restrictions ascribed to the *amparo* action: i) it does not have general effects; ii) it does not declare that the violator, act or law is against the Constitution; iii) it does not provide *erga omnes* protection, as the judicial decision is limited to the particular case; and, iv) it does not create jurisprudence to be applied subsequently to everybody affected by the same constitutional violation.[414] It has been claimed, also, that it has been difficult to satisfy the orders given by the

[410] Amparo Law of 2013, articles 112 - 124. If there is a suspension request the procedure changes slightly in both direct and indirect cases.
[411] Amparo Law of 2013, articles 179 - 191
[412] Baker (n 401) 238.
[413] Ibid 240.
[414] Juan Calleros, *The Unfinished Transition to Democracy in Latin America* (Routledge 2009) 143

judiciary under the *amparo* actions, partly because of the reluctance shown by the executive.[415]

Second, the excess of *amparo* actions against judicial decisions constitutes another objection.[416] It has been established that between 1940 and 1990 there was a workload increase of 349%, moving from an average of 495 *amparo* actions per year to 1386 actions by the end of the period.[417] The excess of *amparo* actions has had two main consequences. One, the quality of the decisions has been compromised, as the quantity of decisions has been prioritised in an attempt to handle the high volumes of cases. Two, the use of procedural reasons to dismiss the actions as a way to avoid a pronouncement about the substance of the matter – known as *sobreseimiento* – has been disproportionate.[418]

This *sobreseimiento* is considered as a formal way to finish with a case. Thus, it is understandable that a judge with a high volume of cases decides to use this tool. As an example, in 1992 the percentage of cases finished with *sobreseimiento* was 77%. It has been observed that when there is an increase in the volume of cases, simultaneously there is an increase in the percentage of *sobreseimiento* decisions.[419]

3.2.3. CONCLUDING REMARKS

The study of the *amparo* action shows that the aim of this legal tool – to protect constitutional rights – has been obscured by its ambiguous scope,

[415] Rubio (n 354) 61; Hector Fix, 'Poder Judicial' in *Transiciones y Diseños Institucionales* (UNAM 2000) 182
[416] Fix (n 415) 178
[417] Ibid. 184
[418] Ibid. 181
[419] Ibid 184–185; Rubio (n 354) 73

and abundant limitations. For the purpose of this research project, such analysis can be used to diagnose the causes that have provoked the existence of an inefficient judicial branch in Mexico. At the same time, it helps to appreciate how the excessive use of this legal tool has negatively impacted the quality of the judicial decisions, has promoted the culture amid the judiciary of using procedural issues to dispose of cases, and has encouraged practitioners to use it as a way of obtaining the suspension of complained acts or decisions, and to delay cases.

The above issues serve as a background to understand why the adoption of a specialised competition tribunal was envisaged in Mexico to remedy them, and why a constitutional reform was required to limit the use of the *amparo* action in antitrust cases to the final decisions adopted by the Mexican competition authorities (see Section 3.4). The next part advances the analysis of the main problems faced by the Mexican judiciary.

3.2.4. MAIN PROBLEMS FACED BY THE JUDICIARY IN MEXICO

a. Lack of independence

Mexico is an example of where the judiciary is subjugated to the executive. Therefore, the fact that a selection process to become a member of the judiciary is now meritorious (Section 3.2.1), combined with the adoption of a specialised competition tribunal whose members have fixed terms (Section 3.4.3), represents a move in the right direction by the Mexican government to gradually strengthen the competition regime by ensuring an independent judiciary. This circumstance is even

more significant considering that for decades the goals of government conflicted with the principles of competition (Section 3.1).

The prevalence of the executive has been reinforced by the hegemony enjoyed by the Party of the Institutional Revolution, or PRI.[420] Rios-Figueroa suggests that when the executive or legislative are strong the judiciary is weak, but particularly weak when the same party controls the presidency and the congress. He tested his hypothesis in Mexico and his main finding was that once the PRI lost the presidency in the federal election in 2000, after 70 decades of hegemony, and lost the majority in the Chamber of Deputies in 1997, the Mexican judiciary became effective due to the fragmentation suffered by the executive and the legislative.[421]

Equally, some authors have indicated that the influence that the executive has exerted upon the judiciary in Mexico has been significant,[422] to such an extent that is has been stated that the Mexican tradition portrays presidents dismissing judges to accommodate their purposes.[423] While some others have indicated that despite the indisputable supremacy of the executive, the judiciary in some cases has performed fairly independently.[424]

[420] Joy Langston, 'Breaking Out is Hard to do: Exit, Voice, and Loyalty in Mexico's One-Party Hegemonic Regime' (2002) 44 Latin American Politics and Society 3, 64
[421] Julio Rios-Figueroa, 'Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002' (2007) 49 Latin American Politics and Society 1, 33, 34, 41, 49
[422] Rubio (n 354) 20; Ana Magaloni, 'Arbitrariedad e ineficiencia de la procuración de justicia: Dos caras de la misma moneda' (2007) 26 CIDE, 14; Hugo Concha and Jose Caballero, *Diagnóstico sobre la Administración de Justicia en las Entidades Federativas. Un Estudio Institucional Sobre la Justicia Local en México. La Función Jurisdiccional* (UNAM 2001) 187, 188; Garcia-Rodriguez (n 359) 1177
[423] Furnish (n 121) 239
[424] Lopez-Ayllon and Fix-Fierro (n 364) 506; Fix-Fierro (n 415) 202

The executive also plays an active role in the law creation process.[425] It has been asserted that the Mexican government, beyond presenting law initiatives, has had the power to impose, modify or cancel the law at its convenience. The Constitution of 1917 has been modified more than 350 times, responding at times to short-term political interests.[426]

This frequent changing of the Constitution, the law, and the regulations makes the tasks of the judges more difficult, as it has been observed that the judges sometimes need to acquire the updated legal publications themselves, considering that their distribution is scarce, and the volumes available in their offices may be damaged, or out of date.[427] It has been stated that the high number of regulations are often contradictory and difficult to fulfil, and that the proliferation of laws and regulations constitutes one of the hurdles in the modernisation of Mexico.[428] Consequently, if judiciaries in other Latin American countries were subjugated to the executive then the case of Mexico, where experts who review antitrust cases are selected after a meritorious process for fixed terms, could be used as reference to try to remedy such a lack of independence.

b. Corruption

[425] Luis Raigosa, 'Algunas consideraciones sobre la creación de las leyes en México' (1995) Isonomia 3, 209. It has been stated that the expertise shown by the executive when creating the law resembles the Mexican political parties legislating without experience in policy formulation and debating, see Isabel Guerrero, Luis López-Calva and Michale Walton, 'The Inequality Trap and its Links to Low Growth in Mexico' (2016) World Bank, 1. See also Susana Pedroza de la Llave, *Poderes Legislativo y Ejecutivo* in *Transiciones y Diseños Institucionales* (2000) UNAM, 132, 142, 144, 158–160.
[426] Rubio (n 354) 20; Fernando Sanchez, 'Competencia Económica en México: Capítulo I Análisis Económico de la Legislación Federal de Competencia Económica' (2004), Comisión Federal de Competencia, 13, 14
[427] Concha and Caballero (n 422) 168
[428] Rubio (n 354) 176

The judiciary in Mexico has been repeatedly perceived as corrupt.[429] This alleged corruption has instilled in Mexican citizens a lack of confidence towards this branch of government, such that citizens have sometimes been reluctant to bring their controversies before the judges due to uncertainty about the transparency of the decisions.[430]

An extended evaluation of this topic could cover a good part of this research project, and although the topic is important, it is not the main focus of the thesis. Suffice, then, to mention that it has been claimed that this phenomenon has been inherited from the time of Spanish colonisation, and has been present in Mexican culture since that time.[431]

To what extent corruption was considered in the context of the creation of the specialised competition court in Mexico is something that will be analysed when reviewing the respective parliamentary debates. At the same time, perceptions given by practitioners are used to establish whether the judiciary responsible for reviewing antitrust cases in Mexico has been afflicted by corruption. It is important to highlight that the purpose of this section is simply to present corruption as an issue afflicting the judiciary.

In any case, according to the argument whereby knowledgeable judges may constitute an antidote to corruption by making the judiciary more

[429] Ibid 240; Magaloni (n 422) 11–12; Guerrero, López-Calva and Walton (n 425) 18; Jorge Bustamante, 'La Justicia Como Variable Dependiente' (1968) Revista Mexicana de Ciencia Política, 41, 42; Garcia-Rodriguez (n 359) 1175–1177; Fix (n 415) 206; Volkmar Gessner, 'Los Conflictos Sociales y la Administración de Justicia en México' (1984) 61 Instituto de Investigaciones Jurídicas, Serie G: Estudios Doctrinales, UNAM, 1984, 142; Concha and Caballero (n 422) 222–223; Inter-American Commission on Human Rights, 'Situation of Human Rights in Mexico' (2015) 44/15 OEA/Ser.L./V/II, 171

[430] It has been found that just 27% of the Mexican population trusts the judiciary. See Guerrero, Lopez-Calva and Walton (n 425) 18.

[431] Rubio (n 354) 155–156

credible,[432] or serve as a deterrent to corruption[433], the adoption of a specialised competition tribunal suggests a great advancement in the implementation of the competition regimen, despite the long trajectory of governments opposing it.

c. Workload

As was mentioned Section 3.2.2, the overuse of the *amparo* action has greatly impacted the total volume of cases that the judiciary is responsible for. There are two main reasons for the unprecedented number of *amparo* actions. First, the fact that the action lacks *erga omnes* effects means that every person needs to file their own petition, resulting in thousands of *amparo* actions per year. Second, the practitioners have found the use of the *amparo* action to be a suitable tool to delay proceedings by seeking their suspension as a precautionary measure.[434] This issue has frequently prevented judges from performing better in terms of the efficiency and quality of their decisions.[435]

Similarly, it has been established that while the population in Mexico has increased, the number of the judges has not increased proportionally. For instance, in 1930 the population was over 16 million and the number of the judges was 52, whereas by 1970 the population reached almost 50 million and the number of the judges was 77.[436] It has been reported that in 2001 Mexico had a ratio of 2.7 judges to every 100,000 inhabitants, the lowest in Latin America, when the recommendation given by the United

[432] Randall Peerenboom has informed that judicial corruption has deteriorated public trust in the courts; see (n 47) 10.
[433] Albanese and Sorge (n 181) 3
[434] Calleros (n 414) 143–144
[435] Concha and Caballero (n 422) 184; Dougherty (n 41) 3
[436] Fix (n 415) 183

Nations was 25 judges to every 100,000. Such scarcity forced judges to delegate the revision and decision of cases to low-level functionaries (called *secretarios*), a condition that increased the opportunities for corruption and reduced the quality of the decision-making.[437]

The inadequate number of judges is not the only feature that has been associated with the high volume of cases. The quality of the law programmes in Mexico, and the requirements to become a practitioner or a judge, are also relevant. It has been claimed that the performance of some not-too-well-prepared practitioners has revealed the overuse of legal tools to extend the length of the process unnecessarily, and to make it more difficult.[438]

Regarding the quality of the law programmes, it has been observed that new private institutions are increasingly created to offer law programmes, without proper controls from the government.[439] This increase in the number of law schools has also meant an increase in the number of law students, which rose from 210,111 in 1970 to 1,482,000 in 1999.[440] It is important to mention that in Mexico it is enough to have a degree in law to be able to perform as a practitioner, and no public exams, private exams run by the bar associations, or practices are required.

It has also been established that because of the low salaries that the members of the judiciary receive, the best-trained law graduate prefers private practice, leaving 93.15% of the judiciary comprising judges and magistrates who have graduated from inferior-quality law programmes or

[437] Calleros (n 414) 170
[438] Concha and Caballero (n 422) 178, 188, 214
[439] Ibid. 219
[440] Lopez-Ayllon and Fix-Fierro (n 364) 559

with uncompetitive institutional pedigrees, according to surveys conducted in 1985 and 1993.[441] It has been indicated that, as a result, the judiciary was stocked with mediocre and less highly qualified students.[442]

In short, the argument goes that the poor quality of the law programmes may have compromised the quality of some review decisions, as the members of the judiciary did not receive a proper training in competition law or economics. Similarly, such pitfalls may have also impacted the performance of some practitioners who due to insufficient knowledge in competition law chose to manipulate the use of legal tools to counteract the limited existence of proper arguments when challenging the decisions adopted by the competition agency.

The combination of these two situations explains (i) why the excessive use of *amparo* actions affected the functioning of the competition authorities in Mexico and increased the workload of the judiciary; and (ii) the observed trend among some judges to avoid the analysis of substantive issues when reviewing antitrust cases as a way to control the workload.

Additionally, considering that the interplay between lawyers and judges determines the quality of the judicial review process, this analysis will be revisited at a later stage to provoke some inferences about the necessity of adopting a specialised competition tribunal and to elaborate on the argument that merely training generalist judges in competition law may not have been an optimal solution.

[441] Dam (n 40) 116
[442] Taylor (n 397) 165

Another concern is that, on average, the methods of teaching law in Mexico are very traditional, worsened by the fact that some professors frequently do not actualise their knowledge.[443] It has been argued that a significant number of members of this guild show a dated mentality with regard to the practice of the law, and a reluctance to embrace new developments. This dated mentality is present in some judges, particularly those who were trained under the tutorial model referred to earlier. Such mentality has endorsed the indiscriminate use of procedural deficiencies as a way to solve the unmanageable volume of cases.[444]

3.2.5. CONCLUDING REMARKS

This chapter has looked at the establishment of the structure of the judiciary in Mexico, and the selection process of the judges and ministers. It has been indicated that before the creation of the CJF, the judiciary in Mexico had a selection process based on a tutorial model, which implied the replication of knowledge from tutor to trainee.

This tutorial model has been depicted as positive because of the close training provided by the mentor. At the same time, though, it was a system that allowed the preservation of a dated mentality among the members of the judiciary, which has impeded the development of the Mexican legal system. Thus, the creation of the CJF has been received with interest, because a meritorious selection process has been implemented, accompanied by the provision of continuous training to the members of the judiciary.

[443] Lopez-Ayllon and Fix-Fierro (n 364) 566
[444] Taylor (n 397) 155–156

Regarding the *amparo* action, it has been seen that this is a very particular legal tool of the Mexican legal system, created to protect the human rights of the Mexican people. Despite its worth, the excessive use of the *amparo* action has also led to an uncontrollable volume of cases, forcing the disposure of cases based mainly on procedural issues as a way to control the workload. At a later stage this chapter will demonstrate how the overuse of this action also impacted the functioning of the Mexican competition authority, which was the reason behind its discussion here.

The dominance of the executive has affected the independence and the effectiveness of the judiciary. Equally, the dominance of the executive has generated a ceaseless process of creation and reform of laws and statutes, which makes their application by the members of the judiciary more difficult. One further issue affecting the judiciary has been corruption. It has been shown that a good percentage of Mexicans do not trust the judiciary, and avoid bringing their disputes before them.

The modest quality of the law programmes on offer, and the high number of institutions offering law programmes without proper supervision with regard to their suitability, combined with the absence of previous exams or practice to become a practitioner, are externalities that have affected the performance of the judiciary. This inadequate training has translated into practitioners unscrupulously, excessively and unnecessarily using *amparo* actions, generating a judiciary incapable of performing efficiently. At the same time, due to the low salaries offered to members of the judiciary, the less competitive law students, graduating from inferior quality institutions, have joined the bench.

Finally, it is necessary to indicate that, the purpose of this thesis being to find some commonalities between Mexico and some other Latin American countries, as well as to offer some lessons to some of these countries searching for practical solutions to lack of independence, workload, quality, or corruption issues amid the judiciary when reviewing antitrust cases, the study of such factors was indispensable. Firstly, such a study has provided a background necessary for an understanding of the nature and magnitude of the issues, and secondly, such analysis will serve to help elaborate on the conclusions regarding the most suitable solution to overcome them. Section 3.3 studies the evolution of the competition law regime in Mexico, and the development of the institutions responsible for deciding antitrust cases in Mexico.

3.3. COMPETITION LAW IN MEXICO

This section provides some background about the evolution of the competition regime in Mexico, and its competition authorities, which is necessary to understand the implications of the adoption of a specialised competition tribunal. The section also explores the obstacles that have impeded the implementation of competition law in Mexico, and hindered better levels of enforcement. Among the obstacles are the overuse of *amparo* actions against the decisions made by the competition authority, and the fact that such decisions were suspended when reviewed, the lack of competition culture, the characteristics of the Mexican markets, and the novelty of the competition regime.

This section is divided into two parts. Section 3.3.1 studies the development of the competition regime in Mexico, while Section 3.3.2 studies the development of the competition authority.

3.3.1. DEVELOPMENT OF THE COMPETITION REGIME

Article 28 of the 1857 Constitution established the first written prohibition of monopolies in Mexico.[445] Then, Article 28 of the 1917 Constitution reaffirmed the mentioned prohibition and enlisted some economic activities that were solely the preserve of the Estate.[446] In 1926, 1931 and 1934 statutes on competition were issued. The statute issued in 1934 gave the Executive the right to impose maximum prices, to restrict the production of goods considered necessary, as well as to limit entry to markets if the existing number of industries was considered enough. In 1936 the Congress invalidated the referred-to statute.[447]

Despite the fact that the first written proclamation against monopolies dated from 1857, and was confirmed by the 1917 Constitution, and that some competition statutes were issued, the levels of enforcement until the middle of the 1980s were low.[448] As was described in Section 3.1, the Mexican economy was characterised until the middle of the 1980s by closed markets, where the government controlled prices and market

[445] Constitución Federal de los Estados Mexicanos, article 28, 1857. This provision prohibited monopolies and any kind of proscriptions to protect the industry, excepting the minting of coins, postal services, and the privileges that, for a short period of time, were given to inventors or improvers of an invention.

[446] Constitución Política de los Estados Unidos Mexicanos, DOF, 5 February 1917. The provision prohibits monopolies and monopolistic practices, and includes the promotion of free competition. Some sectors are excluded, such as postal services, telegraphs, radiotelegraphy, oil and other hydrocarbons, basic petrochemicals, radioactive minerals, nuclear energy, electricity, the issuance of bank notes, the minting of coins, labour unions and cooperative societies, and patent protection and intellectual property rights.

[447] Known as the Organic Law of Monopolies.

[448] It has been indicated that in a period of over 60 years, in Mexico just eight precedent decisions were made at the federal courts since the enactment of 1934 Act. See Garcia-Rodriguez (n 310) 1158. Likewise, the referred-to Organic Law of Monopolies enacted in 1934 has been depicted as "unenforced and impotent", see James Crawford, 'The Harmonization of Law and Mexican Antitrust: Cooperation or Resistance?' (1997) 4 Global Legal Studies Journal, 410, 411.

entries,[449] by having an significant number of monopolised markets, whose existence and permanency was encouraged by the government,[450] and by having a significant number of state-owned enterprises, as a result of a protectionism policy.

Under these circumstances, even if an anti-monopoly provision was endorsed, the Mexican economy was driven by a sense of avoiding competition rather than reassuring it. Any effort to enforce a competition regime that was incompatible with the objectives that were established and perpetuated by the different Mexican governments was in consequence futile.[451]

As was also described in Section 3.1, it was in the middle of the 1980s that the globalisation process started. This free global market phenomenon compelled Mexico to initiate a privatisation and liberalisation process, as well as to properly implement a competition regime.[452] At the same time, the signature of the earlier-mentioned NAFTA agreement also forced the adoption of a renewed competition regime. As part of the negotiations to secure the conclusion of the NAFTA agreement, Mexico was committed to ensuring the prohibition of anticompetitive conducts.[453]

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[449] Gabriel Castaneda, 'Mexico's Competition Regime: Walking the Walk, Slowly' (2010) Competition Law International, 37; James Crawford, 'The Harmonization of Law and Mexican Antitrust: Cooperation or Resistance?' (1997) 4 Global Legal Studies Journal, 410

[450] Marcos Avalos, Naciones Unidas, Comisión Económica para America Latina y El Caribe – CEPAL, 'Condiciones General de Competencia: El Caso de México' (2016) LC/MEX/l. 711,5; Garcia-Rodriguez (n 359) 1158.

[451] Avalos (n 450) 6

[452] OECD, Country Studies, 'Mexico – The Role of Competition Policy in Regulatory Reform' (1998) 7; OECD, 'Competition Law and Policy in Mexico. An OECD Peer Review' (2004) 11

[453] North American Free Trade Agreement, Art. 1501 (1), see also Mateo Diego-Fernández, 'Brevísima Explicación y Análisis de las Reformas a la Ley Federal de Competencia Económica de Mexico' (2011) 1 Revista de Derecho Económico Internacional 1, 78

The combination of the two referred-to situations, on the one hand a Mexico exposed to a globalised market, and on the other a Mexico aiming to be part of the NAFTA agreement as a potential way to solve the severe crisis of the 1980s,[454] resulted in the enactment of the Federal Law of Economic Competition (LFCE) in 1993.[455] The next part of this section will offer a brief description of the main features of the LFCE.

a. LFCE 1993

The LFCE contemplated two types of anticompetitive practices: absolute (Article 9),[456] where monopolistic practices were prohibited *per se* regardless of efficiency claims; and relative (Article 10),[457] where aspects

[454] Crawford (n 449) 408–409

[455] Gabriel Castaneda, 'Antitrust Enforcement in Mexico 1993–1995 and Its Prospects' (1996) 4 U. S. – Mexico Law Journal, 21

[456] "*Article 9. Absolute monopolistic practices are contracts, agreements, arrangements or combinations among competing economic agents, the object or effect of which is any of the following:*
I. Fix, raise, arrange or manipulate the price of sale or purchase of goods or services which are supplied or demanded in markets, or exchange information with the same object or effect;
II. Set the obligation to produce, process, distribute, sell or buy only a restricted or limited amount of goods or provision or transaction number, volume or frequency of restricted or limited services;
III. Divide, distribute, assign or impose portions or segments of a current or potential market of goods and services by customers, suppliers, time or spaces determined or determinable; or
IV. Establish, arrange or coordinate positions or abstention in tenders, competitions, auctions or public auctions. Acts referred to in this article will not have legal effects, and economic operators who engage in them will be subject to penalties set forth in this law, without prejudice to any criminal liability that may result."

[457] "*Article 10. Subject to the cases referred to in Articles 11, 12 and 13 of this Act are checked and considered monopolistic practices acts, contracts, agreements, procedures or combinations whose purpose or effect is or may unduly displace other market players; substantially impede their access or establish exclusive advantages in favour of one or more persons in the following cases:*
I. Between economic agents that do not compete with each other, setting, imposition or establishment of exclusive marketing or distribution of goods or services, by reason of subject, geographical location or for specific periods, including the division, distribution or allocation of customers or suppliers; and the imposition of an obligation not to manufacture or distribute goods or provide services for a specified or determinable time;
II. The imposition of price or other conditions that a distributor or supplier must observe when marketing or distributing goods or providing services;
III. Conditional sale or purchase, acquire, sell or provide other additional goods or services, normally different or distinguishable, or on a reciprocal basis transaction;
IV. Sale, purchase or transaction subject to the condition not to use, acquire, sell, trade or provide goods or services produced, processed, distributed or marketed by a third party;
V. Unilateral action based on refusing to sell, trade or give people certain goods or services available and normally offered to third parties;

such as the substantial power of the agent combined with an efficiency defence were analysed.

A particular feature of the LFCE was that price fixing was considered an absolute conduct; so one of the main goals was to eradicate the deep-rooted tradition of fixing the prices of goods and services, promoted by the industries which were organised in small business chambers, under the guidance of the Ministry of Economy.[458] Also, the inclusion in the LFCE of all governmental entities as economic agents has been seen as a

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VI. The agreement between several economic agents or inviting them to exert pressure against an operator or to refuse to sell, trade or purchase goods or services to such economic operator, in order to dissuade him from a certain behavior, reprisals or force to act in a certain direction;
VII. The systematic sale of goods or services at prices below their average total cost or their occasional sale below average variable cost when there are grounds to assume that these losses will be recovered through future price increases in the terms of the Rules of this Law.
In the case of goods or services produced jointly or divisible for marketing, the average total cost and average variable cost will be distributed among all co-products or, in the terms of the regulations of this Act;
VIII. The granting of discounts or incentives from producers or suppliers to buyers with the requirement not to use, buy, sell, trade or provide goods or services produced, processed, distributed or marketed by a third party, or the purchase or subject transaction the requirement not to sell, trade or provide a third party goods or services to the sale or transaction;
IX. The use of an operator's profits obtained from the sale, marketing or provision of goods or services to fund losses in connection with the sale, marketing or provision of other goods or services;
X. Setting different prices or conditions of sale or purchase for different buyers or sellers located on an equal footing, and
XI. The action of one or more economic agents, direct or indirect in increasing costs or hindering the production process or reducing demand faced by their competitors.

To determine whether the practices referred to in this article should be punished in terms of this Act, the Commission will analyse the efficiency gains arising from the conduct evidencing economic agents and favorably affecting the process of free competition. These efficiency gains may include the following: the introduction of new products; the use balance, defective or perishables; cost reductions resulting from the creation of new techniques and methods of production, asset integration of increases in the scale of production and production of goods or services with the same input; the introduction of technological advances that produce goods or new or improved services; the combination of productive assets or investments and recovery to improve the quality or expand the attributes of goods and services; improvements in quality, investment and recovery, opportunity and service that have a favorable impact on the distribution chain; causing a significant increase in prices or a significant reduction in options, or an important degree of innovation in the relevant market inhibition; and others showing that the net contributions to consumer welfare arising from these practices outweigh their anti-competitive effects."

[458] OECD (n 452) 19; Sanchez (n 426) 96

step forward for the Mexican competition regime, considering the active role that the state has played in the markets.[459]

The LFCE provided the Mexican competition authority, the Federal Commission of Competition (*Comisión Federal de Competencia*), hereinafter CFC, with exclusive antitrust jurisdiction and with the five following powers: (i) to investigate competition law offences (at the request of a private party or on its own initiative); (ii) to decide administrative cases in the area of competition law, enact administrative penalties and refer criminal business practices to the Attorney General; (iii) to issue advisory opinions upon request by the Executive Branch regarding the competition law implications of draft laws and regulations; (iv) to issue legal opinions, on its own initiative regarding competition and free markets access issues; and (v) to contribute in the negotiation and execution of international competition policy, treaties and agreements.[460]

The CFC was also given the three following enforcement instruments: (i) to issue an injunction in any business practice seen to be against the LFCE; (ii) to order the partial or total divestiture of a merger or acquisition in noncompliance; and (iii) to impose fines for antitrust offences.[461] As an important feature, the LFCE for the first time established the power to: (i) investigate and sanction the existence of absolute monopolistic practices (cartels); and (ii) investigate and sanction

[459] Garcia-Rodriguez (n 359) 1162; Joshua Newberg, 'Mexico's New Economic Competition Law: Toward the Development of a Mexican Law of Antitrust' (1994) 31 Columbia Journal of Transnational Law, 601, 602; Avalos (n 450) 8

[460] Garcia-Rodriguez (n 359) 1164, Amilcar Peredo, Sara Gutierrez, and Gabriel Gonzalez, 'Competition Law in Mexico' in Julian Pena and Marcelo Calliari (eds), in *Competition Law in Latin America* (Kluwer Law International 2016) 301

[461] Ibid.

the existence of relative monopolistic practices (vertical agreements and unilateral conduct cases).[462]

In relation to the decisions made by the CFC, the LFCE established a request for reconsideration whereby the CFC itself could revoke, modify or affirm its prior decision.[463] The LFCE did not specify any statutory mechanism for direct judicial review of the decisions made by the CFC, therefore the use of *amparo* actions was an available option for the aggrieved party.[464] The scope of the review was then restricted to the limits of the *amparo* action described in Section 3.2.2.

Regarding private party litigation, Article 32 of the LFCE established that in the case of absolute monopolistic practices, any person could file a written complaint against the alleged responsible practice, indicating that it had sustained, or may sustain, substantial damage or loss. Garcia-Rodriguez mentions that the law did not specify how substantial the loss must be, neither how the CFC was to measure alleged losses in private party actions.[465] He also mentions that the remit for private plaintiffs was narrow, counting a total of 22 private party complaints alleging unlawful monopolistic practice before the CFC during 1993–1994.[466]

Although the adoption of the LFCE generated some expectations, it did not have the impact that was expected, partly for the following reasons. As was mentioned earlier, President Salinas de Gortari sold an unprecedented number of state-owned commercial enterprises. At the

[462] Carlos Mena Labarthe, 'New Competition Policy in Mexico' in Paulo Burnier Da Silveira (ed), in *Competition Law and Policy in Latin America* (Kluwer Law International 2017)
[463] Garcia-Rodriguez (n 359) 1175, OECD (n 452) 39
[464] Ibid. 1176, OECD (n 452) 44
[465] Ibid. 1174
[466] Ibid.

same time, the careless financial liberalisation that took place around the world at that time, combined with the questionable decisions made by the Salinas government in that sector, left Mexico living with a profound crisis in 1994.[467] As the LFCE was adopted during the time when Salinas was governing, this new competition regime was seen as a product of the president, being received with some reluctance, particularly because some attributed the crisis to him.[468]

Another element that impeded the desired levels of enforcement was the structure still present in the markets at the time the LFCE 1993 was enacted. The picture was of highly concentrated markets, where, for instance, 90% of the glass market was controlled by a single firm, 60% of the cement market was controlled by a single firm, 73.9% of the bank sector was controlled by three banks, and 90% of the telecommunications market was controlled by a single firm.[469]

These high levels of market concentration likely had an impact on the unwillingness to comply with the new antitrust statute, considering that for decades Mexico did not have a proper antitrust policy. The Mexican competition commission in its first annual report indicated that the "*lack of vigorous competition policy in the past*" was enabling concentrated industries to disregard the competition regime.[470]

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[467] See '*globalisation'* in Section 3.1.
[468] OECD (n 452) 12
[469] Newberg (n 459) 603–604
[470] Comisión Federal de Competencia, Annual Report, 1993–1994, p. 14. It has also been reported that it was during the second functioning decade of the FCC that actions were taken against the largest provider of telecommunications services in Mexico – Telmex, and its politically influential leader, Carlos Slim. See William Kovacic and Marianela Lopez-Galdos, "Life Cycles of Competition Systems: Explaining Variation of New Regimes" (2016) 4 Law and Contemporary Problems 79, 96; Allan Van Fleet, 'Mexico's Federal Economic Competition Law: The Dawn of a New Antitrust Era' (1995) 64 Antitrust Law Journal, 183

But beyond the willingness or not to observe the new antitrust statute, it has been stated that not many people were aware of the meaning of the statute, nor of its implications. And this has been one of the hurdles that have impeded the levels of enforcement expected with the adoption of the LFCE.[471]

Three more elements have been indicated as causing low levels of enforcement after ten years of the LFCE being enacted: (i) the public perception that the CFC was not a strong body because of the delays caused by constant judicial challenges to its decisions through *amparo* actions; (ii) the general idea that its decisions did incorporate non-competition interests; and (iii) the considerable number of decisions wrongly reversed due to lack of competition knowledge or suspended in judicial review through *amparo* actions.[472] One may argue that the number of reversed decisions was a sign of a strong and effective judiciary, but given the above issues such an argument may appear more contestable.

Likewise, the CFC reported that after a decade of operations the following were the main obstacles encountered by the commission when trying to enforce the competition regime: i) low levels of competition culture; ii) excessive use of *amparo* actions (Section 3.4.1 describes this hurdle in more detail); iii) low payment of the fines imposed (Section 3.4.1. describes this hurdle in more detail); iv) some legal barriers such as a limited scope of action when the ones affected by the anticompetitive

[471] Umut Aydin, 'Competition Law and Policy in Mexico: Successes and Challenges' (2016) 4 Law and Contemporary Problems, 79, 155; OECD (n 452) 12; Van Fleet (n 470) 204. In 2009 a survey showed that just one percent of the Mexicans knew which body promoted competition among firms, see Federal Economic Competition Commission, 'Working Together for a Competition Culture' (2015) 9

[472] Aydin (n 471) 155; Kovacic and Lopez-Galdos (n 470) 96–97; Claudia Brambilla, 'Mexico' (2004) Competition Regimes in the World – A Civil Society Report, 598; OECD (n 452) 8; Mena (n 462) 6

behaviour were consumers; v) impossibility of conducting on-site searches by the CFC; and vi) lack of leniency programmes to combat cartels.[473]

With the aim of alleviating some of the issues mentioned above, the LFCE was modified in 2006 to increase the merger notification thresholds, so allowing the CFC to focus on merger reviews likely to raise competitive concerns. This included five conducts that could be considered relative monopolistic practices, giving powers to the CFC to conduct on-site searches observing some conditions, and to introduce a leniency programme.[474]

In 2011 a new reform was introduced, this time increasing the amount of economic sanctions in cases of abuse of market power, increasing the scope of criminal prosecution in cases of cartels, and increasing the sanctions based on company revenues in such cases. An important modification was also introduced in 2011[475] consisting of the adoption of specialised competition tribunals pursuing to gain efficiency and to improve the quality of the judicial review process, although the implementation did not take place until after further reform.[476]

In 2012, under the governance of Enrique Peña Nieto (2012–2018), the Mexican Congress agreed to undertake significant reforms in different areas. This agreement was named "*the Pact for Mexico*" – *Pacto por*

[473] Sanchez (n 426) 115–124
[474] OECD, 'The Resolution of Competition Cases by Specialised and Generalist Courts – Stocktaking of International Experiences' (2016) 19–20
[475] *Parliament Gazette*, XIV, 14th April 2011, No. 37242-III, regarding the adoption of a specialised competition tribunal it was indicated that: "*it would be a guarantee of impartiality, efficiency, specialisation, and professionalisation*".
[476] OECD (n 452) 20. Despite article 6 of the *Official Gazette* 10 May 2011 establishing the creation of a specialised competition tribunal in Mexico, this reform did not take place.

México – and contained 95 initiatives, divided into five categories, one of which related to aspects such as economic growth, employment, and competitiveness.[477]

The Pact for Mexico signified the modernisation of rules and processes, and the creation of different institutions in different sectors. Specifically in the competition area, in 2013 two competition authorities, the Federal Economic Competition Commission (hereinafter COFECE) and the Federal Telecommunications Institute (hereinafter IFT), were created, as well as a specialised tribunal in these areas. Likewise, a new Federal Economic Competition Law (hereinafter LFCE) was enacted in 2014 in accordance with the newly created authorities, and for this purpose the next part of this section will examine the main changes introduced by the LFCE 2014.[478]

b. LFCE 2014

The new competition regime became effective on 7 July 2014, with the aim of improving effective competition by giving more powers to the competition authorities, and preventing concentrations and practices that might generate anticompetitive effects. Therefore, aspects relating to merger control and monopolistic practices were reformed, the investigation procedure by the competition authorities was modified, the criminal sanctions in cases of absolute monopolistic practices were

[477] Pedro Valenzuela, 'Mexico's Reforms and the Prospects for Growth' (2016) Mexico Institute, 11–12. One of the goals of *"The Pact for Mexico"* was *"...to legislate in the broadcasting and telecommunications matters, in order to warranty its social function and to modernize the State and the society, throughout the information technologies and the communication, as well as to strengthen the faculties of the authority in economic competition matters"*, Luis Aziz and Ismael Henestrosa, 'The New Era of the Mexican Antitrust Legal System' <https://www.expertguides.com/articles/the-new-era-of-the-mexican-antitrust-legal-system/arocsirx> accessed 23 May 2017

[478] *Official Gazette* May 2014

increased, and more powers to carry out dawn raids were given to the competition authorities, among other features.[479]

Section 3.3.2 examines the development of the competition authorities in Mexico. This background shows the efforts made by the Mexican government to improve the levels of enforcement, which eventually led to the adoption of a specialised competition tribunal. At the same time, it shows the obstacles encountered by the competition authorities and aims to illustrate why the adoption of this specialised competition tribunal was seen as a solution.

3.3.2. DEVELOPMENT OF THE MEXICAN COMPETITION AUTHORITIES

As has been mentioned earlier, despite monopolies being prohibited and free markets proclaimed since the 1857 Constitution, it was not until 1993 that a competition regime was enacted and a competition authority established. Thus, the enactment of the LFCE in 1993 made necessary the creation of the CFC to enforce it.

a. The CFC

The CFC was conceived as an independent body attached to the Ministry of Trade and Industrial Promotion (hereinafter SECOFI) for the purposes of budgetary administration. Its responsibility was the exclusive application of the LFCE. Four factors have been described as motivating its creation: (i) the negotiation of NAFTA; (ii) the personal convictions of

[479] Luis Garcia, Mauricio Serralde and Jorge Karlg 'Mexico: New Antitrust Authorities and a New Federal Economic Competition Law' (2015) 6 Journal of European Competition Law & Practice 1, 44

some liberal public servants; (iii) the influence of international organisations; and (iv) the pressure from international firms and corporate bodies.[480] The CFC comprised five commissioners designated by the president of Mexico for a period of ten years, whose decisions were made by majority vote.[481] In terms of institutional design, the CFC did not show a clear separation between the investigative body and the decision-making one.[482]

The performance of the CFC has been considered satisfactory notwithstanding the presence of the following obstacles that surrounded the evolution of the Mexican competition regime: the lack of competition culture, the special characteristics of the Mexican markets, and the excessive use of *amparo* actions against its decisions. Overall, the experience gained by the CFC, and the increased powers given to this body, enhanced its performance.[483]

Subsequently, the amendment of the Constitution in 2013 reassembled the CFC by making it autonomous and by naming it the Federal Commission of Economic Competition (Comisión Federal de Competencia Económica (hereinafter COFECE).[484] The objective of this change was to improve the low levels of enforcement shown by the CFC, and to change the public perception that the CFC was a weak body.[485]

b. The COFECE

[480] Mena (n 462) 5
[481] OECD (n 452) 17–18
[482] Mena (n 462) 17
[483] Aydin (n 471) 156
[484] *Official Gazette* June 2013; Aydin Umut, op. cit, *supra* note 102, 156
[485] Aydin (n 471) 155; Kovacic and Lopez-Galdos (n 159) 96–97; Brambilla (n 472); OECD (n 452) 8

The COFECE is an autonomous body, whose main objective is to supervise, to promote, and to guarantee free access and competition in the markets, except in telecommunications. It is also responsible for the enforcement of the Federal Economic Competition Law, and for the promotion of competition culture.[486]

It is comprised of seven commissioners selected after a qualification process, nominated by the Head of the Federal Executive and subsequently ratified by the Mexican Senate.[487] The Commission has a Chair who is chosen by the Senate for a period of four years.[488] At the same time, COFECE has an investigative authority responsible for conducting the investigations,[489] whose findings are presented to the Plenum of the Commission for decision issue[490] and whose members deliberate in a democratic manner, requiring a voting majority to decide cases.[491] Such institutional design reform consisting of the separation of the investigative body (in charge of the investigation) and the Plenum (in charge of deciding the cases), both coexisting within the Commission's structure, was envisaged to ensure a checks and balances scheme.[492]

The 2013 Constitutional reform strengthened the powers of COFECE by adjudicating the possibility to regulate the access to essential inputs and to order the divestiture of economic agents' goods to correct market failures.[493] Before this Constitutional reform there was an obligation to publish the initiation of an investigation, which was eliminated by

[486] <https://www.cofece.mx/cofece/ingles/index.php/cofece/que-hacemos> accessed 22 July 2017
[487] <https://www.cofece.mx/cofece/ingles/index.php/cofece/quienes-somos> accessed 3 May 2017
[488] <https://www.cofece.mx/cofece/ingles/index.php/cofece/comission-s-chair> accessed 22 July 2017
[489] <https://www.cofece.mx/cofece/ingles/index.php/cofece/investigation-authority> accessed 22 July 2017
[490] *Official Gazette* 8 July 2014; Agreement CFCE-148-2014, article 5, VI.
[491] Mena (n 462) 16
[492] Ibid. 17
[493] Ibid. 21

allowing COFECE to wait 120 days to publish such an initiation, a period within which it can carry out verification visits without alerting the parties.[494]

In relation to cartels, the reform also included the power to penalise any exchange of information between competitors intent on restricting supply, allocating markets or rigging bids, or whose actions have those effects.[495] Regarding the window within which COFECE could start an investigation of a concentration or monopolistic practices, this was extended from five to ten years, calculated from the date of the unlawful concentration or from the date of the cessation of the monopolistic practice.[496]

The administrative sanctions were imposed as follows: (i) for absolute monopolistic practices (cartels) the Commission could impose fines of up to 10% of the economic agent's income for the previous tax year, with criminal sanctions (where the Commission could act only as a complainant since the procedure was carried out by a Federal Prosecutor and criminal courts); and (ii) for unilateral conduct cases the Commission could impose fines up to 8% of the economic agent's income for the previous tax year. In both cases the Commission could double the fine in the case of a second violation.[497]

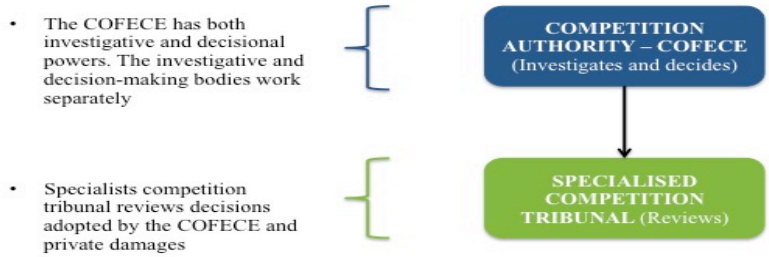
In terms of judicial review, the 2013 Constitutional reform introduced an important reform consisting of the reconfiguration of the appeal procedure by affected parties who were aiming to challenge acts or

[494] Ibid. 28
[495] Ibid. 27
[496] Peredo, Gutierrez, and Gonzalez (n 460) 303
[497] Ibid. 310, 317

omissions of COFECE through an indirect *amparo*, as Section 3.4.1 describes in more detail.[498] It is important to remember that the LFCE did not specify any statutory mechanism for direct judicial review of the decisions made by the CFC, which is why the use of *amparo* action was an available option for the aggrieved party.[499]

At the same time, the 2013 Constitutional reform limited the suspension of the challenged acts, except in cases where the COFECE imposed fines or the divestiture of assets, rights, partnership interests or stocks.[500] Figure 3.1 presents the appeal review of the decisions adopted by COFECE.

Figure 3.1.a: Review of the decisions adopted by COFECE



c. *The IFT*

The IFT is an independent body with an independent budget. This body has exclusive powers to guarantee and promote competition within the

[498] Mena (n 462) 17
[499] Garcia-Rodriguez (n 359) 1176
[500] Mena (n 462) 17

broadcasting and telecommunications sector, being also its regulator.[501] Seven commissioners comprise the IFT for a period of nine years. They are proposed by the Federal Executive, and ratified by the Congress prior to an evaluation process.[502]

The main challenge faced by the IFT was to regulate and bring competition into a highly concentrated sector where a single company dominated 80% of the fixed line market and 70% of the mobile phone market. This lack of competition resulted in an inefficient sector, leaving Mexico as one of the countries with the highest telecommunication fees, and lowest levels of market penetration.[503]

Another particular feature that forced the creation of the IFT was that during the privatisation process that the country experienced in the 1990s, the government gave just one private entity – Telmex – entire control over the sector. The transference occurred with the same structure and market power, without previous segmentation of the different services, before an adequate competition regime was enacted, and accompanied by a long-term and unclear concession.[504] This situation impeded the achievement of good enforcement levels in the telecommunications sector.

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[501] OECD, 'Competition and Market Studies In Latin America. The Case of Chile, Colombia, Costa Rica, Mexico, Panama and Peru' (2015) 44-45

[502] OECD, Reviews of Regulatory Reform, 'Regulatory Policy in Mexico – Towards a Whole-of-Government Perspective to Regulatory Improvement' (2014) 134 <https://read.oecd-ilibrary.org/governance/regulatory-policy-in-mexico_9789264203389-en#page136 > accessed 30 July 2017

[503] OECD, 'Review of Telecommunication Policy And Regulation In Mexico' (2012) 11–12

[504] Sanchez (n 426) 79–81; OECD (n 503) 118. The dominance that was enjoyed by Telmex did not impact just the national markets, as the decision reached by the World Trade Organisation in April 2004 at the instance of an American complainer showed. See Maher Dabbah, *International and Comparative Competition Law, Antitrust and Competition Law* (Cambridge University Press 2010) 615–616.

3.3.3. CONCLUDING REMARKS

It has been observed that although the prohibition of monopolies and proclamation of free markets dated back to 1857 in Mexico, the levels of enforcement until early 1990s were low. Such low levels of enforcement were the reflection of a government highly involved in controlling markets and whose objectives conflicted with the goals of the competition regime. One more reason was the novelty of the competition regime, along with a lack of competition culture, and exacerbated by an unwillingness to embrace it. The enforcement was also affected by the misuse of *amparo* actions against the decisions made by the competition authority, impacting negatively on its levels of efficiency, as well as the levels of efficiency of the judiciary.

Measures were taken to address some of these issues, such as the enactment of a competition regime, and the creation of a competition authority in 1993, whose powers were strengthened through time. An attempt was also made to create a specialised competition tribunal in 2011, but it did not get off the ground. Finally in 2013 a specialised competition tribunal was created, as part of an initiative presented by President Enrique Pena (elected 2012), under an inclusive programme known as "*the Pact for Mexico*".

Having provided an overview of the evolution of the competition regime in Mexico and its competition authorities, as well as setting out the severe obstacles that impeded the implementation of the competition law, we now examine in Section 3.4 the reasons why a specialised competition tribunal was created in Mexico, how it has been integrated, and how the review process has been transformed.

3.4. ADOPTION OF THE SPECIALISED COMPETITION TRIBUNAL IN MEXICO

In order to appreciate why in Mexico it was considered necessary to adopt a specialised competition tribunal, it is indispensable to explore how the review process was undertaken prior to the adoption of such a tribunal. For this purpose, Section 3.4.1 is concerned with explaining the review process before generalist judges. Section 3.4.2 presents the main obstacles that the old review process faced, such as the overuse of *amparo* actions, the admissibility of *amparo* actions against intermediate decisions, the possibility of suspending the challenged decisions, the existence of another review instance when appealing the imposed fines before the tax court, the difficulty of making the fines effective and the preference for solving the review decisions based on procedural issues.

After examining the obstacles that the old review process encountered, this section shifts the focus to the analysis of why the government proposed such institutional reform, and the discussions of it inside parliament. It then moves on to explore how the specialised competition tribunal was designed and concludes by summarising the new review process.

3.4.1. OVERVIEW OF THE OLD REVIEW PROCESS BEFORE GENERALIST JUDGES

Prior to describing the old review process observed in Mexico before the adoption of a specialised competition tribunal, it is important to outline the most common institutional settings for the review of antitrust decisions, with a view to providing a theoretical framework that will

serve for further analysis. In some countries' systems, the competition authority brings alleged breaches of competition rules before the court, which acts as decision-maker.[505] In others, the courts review the administrative decisions previously adopted by the competition authorities. Equally, in some jurisdictions the competition authority itself reconsiders any disputed decision, with the possibility of further appeal to the courts.[506]

The courts may perform under an *inquisitorial* system, where there is an investigative phase for gathering evidence and an examining phase, and the analysis of the judges is based on the written narrative documents provided by the parties.[507] This system differs from the *adversarial* system where there is an open rivalry between the prosecution and the party's defence to make the most convincing argument for their case, and where the responsibility for collecting evidence rests with the parties of the trial.[508]

In terms of the design of the competition authorities and the review of their decisions, there are two variants. In the *administrative enforcement regime* the same agency investigates and decides a case without any internal separation, while in the *integrated model* one body of the competition authority is responsible for the investigation, while another is responsible for the first-level adjudication of investigated cases. In each

[505] OECD, 'Institutional and Procedural Aspects of the Relationship Between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency' (2011) 11 <http://www.oecd.org/daf/competition/ProceduralFairnessCompetition%20AuthoritiesCourtsandRecentDevelopments2011.pdf > accessed 24 October 2019
[506] Ibid. 11
[507] OECD (n 474) 28
[508] Ibid.

of these cases, the decision is then subject to judicial review by a court, which may be specialised or generalist.[509]

The standard of review is also different from jurisdiction to jurisdiction. In some countries, the review is of the legality of the administrative decision. This involves an examination of the facts; the evidence relied on, the limits of the authority's discretion, and an insurance that no error of law has been made.[510] In others, the review is on the merits of the case known as *de novo* where all the powers conferred to the original decision-maker are exercised by the courts[511] given deference to the agency due to the almost inexistent presumption of correctness.[512]

The literature has identified three levels of intensity of judicial review.[513] Low intervention is when the courts try not to substitute their decision for that of the agencies.[514] Intermediary is when the courts give some margin of appraisal in complex economic and technical issues.[515] Unlimited is when the courts give a comprehensive revision of the facts leading to a judgment that substitutes the decision adopted by the authority.[516]

The intensity of the judicial review dictates the various types of standards of review. Thus, five material errors have been established: (i) material

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[509] OECD, *'Australia Pecuniary-Penalties'* (2018), Report. <https://www.oecd.org/df/competition/Australia-Pecuniary-Penalties-OECD-Report-2018.pdf> accessed 4 August 2019

[510] OECD (n 505) 11

[511] Ibid; Daniel Gopenko, 'Reconsidering De Novo Standard of Review in Patent Claim Construction' (2012) 40 AIPLA Quarterly Journal 2, 317, 330

[512] Kevin Casey, Jade Camara, and Nancy Wright, "Standards of Apellate Review in the Federal Circuit. Substance and Semantics" in The Federal Circuit Bar Journal <https://www.stradley.com/-/media/files/resourceslanding/publications/2001/01/standards-of-appellate-review-in-the-federal-cir__/files/krc-standards/fileattachment/krc-standards.pdf> accessed 27 November 2019

[513] Lianos, Jenny, Wagner, Motchenkova, and David (n 351) 5

[514] Ibid.

[515] Ibid.

[516] Ibid.

error of law, consisting on a wrong interpretation of the law, misapplied to the facts in question; (ii) material error of fact, where the decision was based on a misinterpretation of the facts; (iii) material procedural irregularity, where the decision was biased or unfair; (iv) unreasonable exercise of discretion, referring to a situation where such discretion falls outside the limits within which a reasonable decision-maker would act; and (v) unreasonable evaluative judgments or predictions, referring to a critical analysis of the relevant factors following the right logical procedures, and prediction being reasonable.[517]

The above principles lead to two important conclusions for the purpose of this research project. First, that the institutional arrangements of the competition agencies, as well as the powers enjoyed by it, determine the optimal intensity of the judicial review. In other words, the greater the power of the agency, the greater the intensity of the supervisory jurisdiction. In this sense, the OECD has recommended a full review of the decisions adopted by agencies that have implemented an administrative enforcement regime, claiming that when an agency enjoys both investigative and decision-making powers it tends to lose self-critique.[518] Second, that if intense scrutiny of competition decisions is pursued then judges skilled in economics and competition are required to offer a rigorous assessment of their correctness, both substantively and procedurally.

With this in mind, the next part explores the judicial review in Mexico before the adoption of a specialised competition tribunal. In relation to the institutional design of the Mexican competition agency, before the

[517] Ibid. 9, 10
[518] OECD (n 43) 3

Constitutional reform of 2013, the CFC operated under the design known as the *integrated model*, where the same body that investigated cases also resolved them. This design received some criticism as it was indicated that the same body effectively acted as prosecutor and jury.[519] There was also an option for the parties to request the reconsideration of the decision before the plenum of the competition authority (known as an administrative appeal).

With regard to the judiciary, the courts act under the *inquisitorial* system whereby decisions made by the competition authority are challenged.[520] In general, the judicial review of the decisions adopted by the competition agencies in Mexico focuses on their legality and constitutionality. The supervisory exercise also includes the constitutionality of the norms invoked to support the contested decision.[521]

Given that the judicial review is perceived as serving an error-correction function,[522] the next part presents the two options that were available to contest the decisions adopted by the CFC. The first was an *amparo* action on the grounds that an unconstitutional statute was being applied or process rights were being infringed.[523] As explained in Section 3.2.2, the *amparo* action allowed all citizens to seek protection against unconstitutional acts by government.

Particularly in relation to agencies, the *amparo* action was available because Article 16 of the Mexican Constitution demanded that agency

[519] Mena (n 462) 17
[520] OECD (n 474) 28
[521] OECD, 'Procedural Fairness: Competition Authorities, Courts and Recent Developments' (2011) 81
[522] Lianos, Jenny, Wagner, Motchenkova, and David (n 351) 5–6
[523] OECD (n 452) 19

orders comply with legal bases and justify their actions.[524] Following this reasoning, the Supreme Court in Mexico advanced the matter by indicating that agency decisions could be challenged if the party estimated that the decisions were arbitrary or capricious, unsupported by substantial evidence or founded on reasoning that was illogical or contrary to the principles of law.[525] Therefore, it could be said that the judicial review focused on errors of law, errors of fact, and unreasonable exercise of discretion.

Within the judiciary, the District Courts represented the first review instance for decisions of the CFC, it being possible for the involved parties to request the suspension of the effects of the resolution under review.[526] Once the Administrative District Court made a decision, a Collegiate Circuit Court, hierarchically superior to a district court, could review it. If the review involved a claim of statutory constitutionality or conflicts between appellate courts, then the review process went before the Supreme Court.[527]

Under this procedure, parties were enabled to challenge final and intermediate decisions made by the CFC,[528] among them: 1) information demands issued at all phases of preliminary investigations and formal proceedings; 2) decisions to admit or reject evidentiary submissions; 3) preliminary injunctions and other interlocutory orders; 4) fines imposed for failure to comply with discovery orders; and 5) final agency determinations and orders.

[524] OECD (n 452) 44
[525] Ibid.
[526] OECD (n 505) 81
[527] Ibid.
[528] OECD (n 452) 19; OECD (n 452) 44

The second option was the possibility of appealing the fines imposed by the CFC before the Federal Court of Fiscal and Administrative Justice (hereinafter TFJFA or tax tribunal). The review procedure started with the use of an appellate action by the affected party, involving not just the imposition of the fine but the entire decision made by the competition authority. If the party was discontented with the decision made by the tax tribunal, it had the option to appeal the decision before an appellate tribunal.[529] As with the review process before an Administrative District Court, if the ruling was on the constitutionality of the LFCE or conflicts between appellate courts, then the Supreme Court had the jurisdiction.[530]

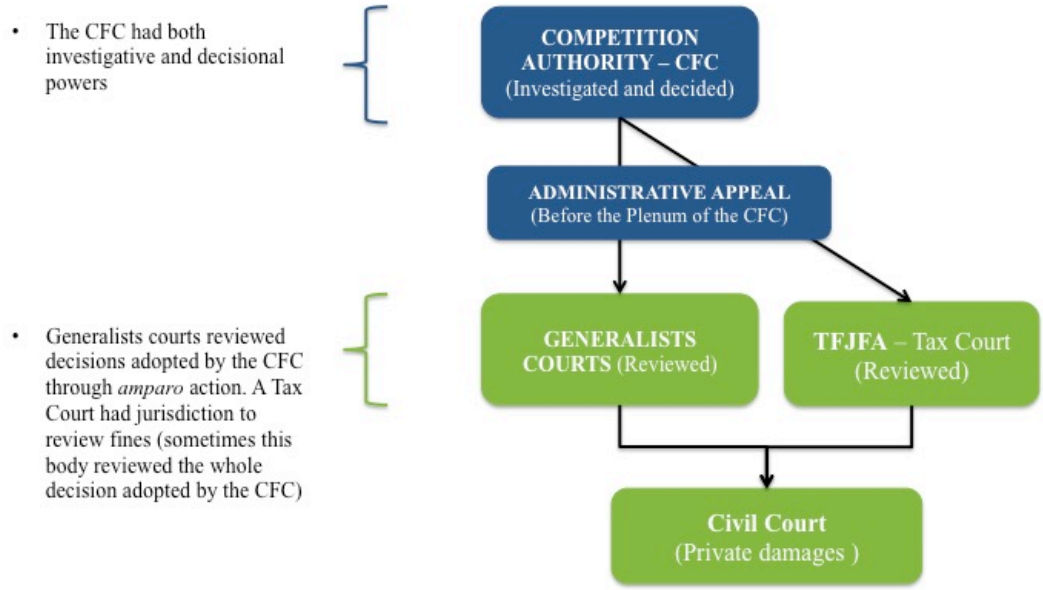
In terms of private actions, the procedure was limited to claiming damages after the CFC found a violation,[531] whereby individuals presented a copy of the CFC's resolution before a civil court responsible for identifying the cause of the damage, assessing it, and deciding on an economic compensation.[532] The fact that dissatisfied parties had the possibility to challenge not just final but intermediate decisions made by the CFC constituted an important enforcement obstacle, as the next part of this section illustrates.

Similarly, the use of the *amparo* action negatively affected the quality of the review decisions, a circumstance that motivated the adoption of the specialised competition tribunal in Mexico, and a situation that was specifically acknowledged by the government when proposing the adoption, stating as they did that competition and telecommunications

[529] Ibid.
[530] Ibid. 46. An example of this attribution can be seen on the decision made by the Supreme Court, *amparo* on revision 2617/96, when examining the constitutionality of different concepts contained and defined by the LFCE, such as relevant market, substantial power, entry barriers, etc.
[531] OECD (n 452)19
[532] OECD (n 505) 82

matters were highly complex and that this tribunal would allow the specialisation required to deal with them. Section 3.4.2 will expand on this governmental initiative. The following figure describes the review of CFC decisions before generalist judges:

Figure 3.1.b: Review of the decisions adopted by the CFC



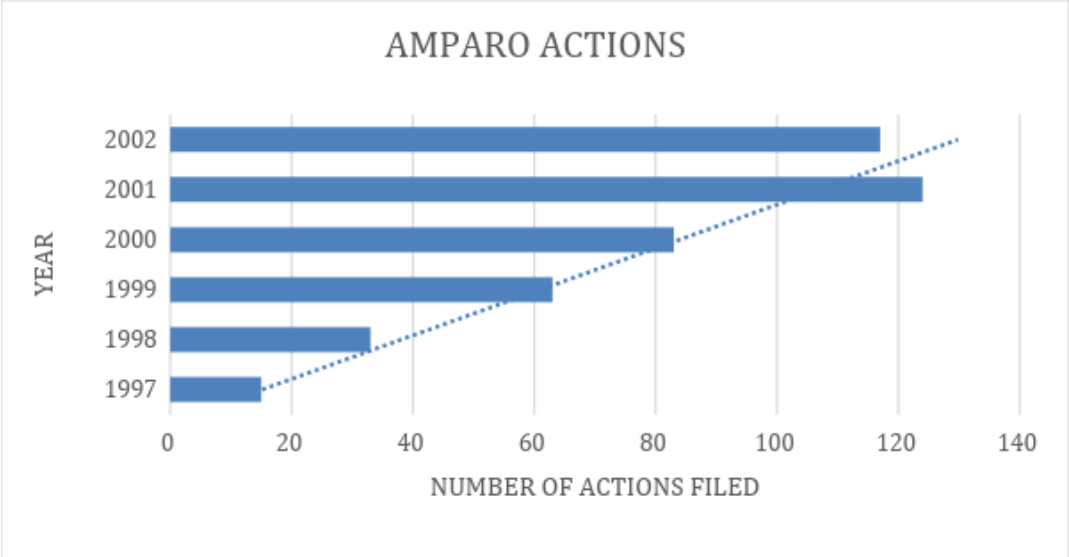
a. Overuse of amparo actions: the main enforcement obstacle

As was highlighted earlier when examining the judiciary in Mexico, one of the main problems that this branch encounters is the uncontrollable volume of *amparo* actions originated by discontented parties whose constitutional rights have been presumably violated by an authority. The overuse of this legal tool was also present in antitrust cases.

The CFC reported that after ten years of operation, the statistics showed that there was one *amparo* action for every eight cases, giving a total of

635 *amparo* actions to 31st March 2003. It was also established that more than 40% of the *amparo* actions were initiated against intermediate or preliminary decisions. Figure 3.2 shows the increase in the number of *amparo* actions against decisions made by the CFC between 1997 and 2002:[533]

Figure 3.2: Overuse of amparo actions



These numbers illustrate a significant increase of *amparo* actions, which made extra work for the CFC not only in replying to the *amparo* actions,[534] but in commencing new procedures when the decisions of the district courts were favourable to the discontented parties. This situation was exacerbated when a file involved more than one party, as the CFC had to respond to multiple *amparo* actions that over a single file were presented in different district courts by different parties, and had to marry such decisions that were frequently contradictory to one another.[535]

[533] Sanchez (n 426) 118–120
[534] The OECD established that the CFC dedicated 40% of its efforts to dealing with *amparo* actions; see OECD (n 452) 54.
[535] Ibid. 44–45

Another problem with the *amparo* action for the CFC was that once the judge made a decision, usually issued in compliance with mere formalities, the CFC had to adjust its intermediate or (occasionally) final decisions according to a meagre judicial review.[536] Once the CFC made the new decision, a new *amparo* action was presented against it turning the cases known by the CFC into endless proceedings.[537] It can be argued that this situation was a sign of a mature system, however this was not the case as the shallow assessment of anticompetitive conducts and the inclination to reduce the analysis of the formalities for its issuance resulted in an endless cycle of reviews.

Beyond lengthening the review process by using the *amparo* action indiscriminately, the parties also aimed to suspend the challenged decision, a feature that characterises the *amparo* action. As indicated earlier in the examination of this action, the judge has the faculty to suspend the decision under scrutiny.

The suspension of such CFC decisions has been identified as one of the most harmful tools against competition in Mexico. The *amparo* action became a legal instrument used to delay the enforcement of the impugned decisions, as it was well known by the parties that during the review process the district courts usually suspended the orders of the CFC.[538] In the telecommunications sector, for instance, it has been indicated that the suspension of the decisions resulted in gains for the incumbent and losses for the entrants.[539]

[536] OECD (n 505) 82
[537] Sanchez (n 426) 120–121
[538] OECD (n 503) 45
[539] Ibid. 118–119

b. The Tax Court: another instance of reviewing the decisions made by the CFC

When the CFC imposed fines, it was possible for the affected parties to challenge that decision before the TFJFA. This tax tribunal did not only review the decision about the legality of the imposed fines but also the legality of the entire process, including procedural and substantial issues. Such processes constituted another way to obtain the review of the whole decision made by the CFC.[540]

The fact that the TFJFA was entitled to review the whole procedure signified that the CFC did not have to merely defend its decisions before the district courts. Rather, it also had to defend them before the tax court, which meant a high workload for the competition authority, extending the process unnecessarily.[541] It has been reported that the CFC lost a number of cases before the Fiscal Court on the grounds that its orders imposing fines were not adequately justified.[542]

c. Confirmation of fines

Ten years after the CFC started its operation, just 9.7% of the imposed fines were paid. It was indicated that it was almost impossible to enforce payment, mainly because the fined parties had so many legal tools to request the review of the decision. Among them, the revision before the same CFC, before the TFJFA, or before a district court using the *amparo*

[540] Avalos (n 450) 19
[541] Ibid.
[542] OECD (n 452) 46

action, and sometimes even before the Supreme Court.[543] Furthermore, it was noted that the maximum fines imposed were very low, and so did not counterbalance the possible benefit that economic agents might gain from the anticompetitive conduct.[544]

At the same time, the unlikelihood of obtaining a timely review of the decision and then the collection of the payment constituted an important enforcement obstacle, and the parties were aware that the competition regime had a fundamental weakness. This awareness allowed them to manipulate the review process of the fines decisions by requesting the suspension of the challenged fine or avoiding the payment. In the end, the CFC was in a position where the imposition of a fine was not an effective deterrent, making of the CFC a powerless competition authority.[545]

In terms of the collection of payments of the limited number of fines decisions that were finally confirmed, the process was in the hands of the municipal authorities, which did not have any major incentives to undertake the function in question, neglecting it as a result.[546]

d. Quality of the review decisions

[543] Sanchez (n 426) 121–122. A case exemplifies the situation: On 26th April 1996, the CFC opened an investigation against Grupo Warner Lambert Mexico (file 10-16-96) for abuse of dominant position, declaring it responsible, and imposing a fine on 19th November 1997. Warner requested reconsideration of the decision on 16th February 1998 (file RA-04-98). The CFC confirmed the reconsideration decision on 14th May 1998. Against this decision Warner presented an *amparo* action (file 350/98), a decision that was appealed by the CFC and Warner, respectively. The Supreme Court solved part of the appeal (file 1486/99), leaving jurisdiction to the collective circuit tribunal who on 22nd February 2002 (file 502/2001) annulled the reconsideration decision made on 16th February 1998 under the file RA-04-98. Thus, a new decision was made by the CFC on 6th June 2002 conforming its terms with the review decision made by the collective circuit tribunal.
[544] Mena (n 462) 11
[545] The CFC reported that between 1993 and 2004, 56% of the imposed fines were pending of review decision in *amparo* action of nullity trial before the TFJFA; 19% were paid; 20% were revoked after a review decision in *amparo* action or nullity trial; and 13% were pending to be paid. Information contained in the annual report of the CFC, 2004, 28.
[546] Aydin (n 471) 170

It has been repeatedly stated that in Mexico the majority of the district court judges, the collective circuit tribunals, and the members of the tax court – TFJFA – were not familiar with competition matters.[547] It has been agreed also that this unfamiliarity with competition matters during the review process caused the deviation from thoroughly examining the conduct's matter to instead focusing merely on issues of form.[548]

3.4.2. WHY A SPECIALISED COMPETITION TRIBUNAL WAS CREATED IN MEXICO

Earlier, when analysing the development of the competition regime in Mexico, it was mentioned that the constitutional reform of 2013 introduced the creation of a specialised competition tribunal in Mexico. This initiative was promoted by President Enrique Peña Nieto, elected in 2012, and was known as "*the Pact for Mexico*".

"*The Pact for Mexico*" brought together the leaders of the more relevant political parties in Mexico. The leaders attended different meetings over a period of months where, having established the rules of the meetings, the aim was to adopt a series of reforms. These reforms aimed to achieve social development, lessening the country's inequality and abolishing extreme poverty.[549]

By the end of November 2012, the Pact had a draft of what was considered the focus of the reform, consisting of more than 80

[547] Ibid.; OECD (n 452) 45; Avalos (n 450) 10; Garcia-Rodriguez (n 359) 1176; OECD (n 503) 73; OECD (n 474) 20
[548] Kovacic and Lopez-Galdos (n 159) 107; Sanchez (n 426); OECD (n 474) 38; OECD (n 505) 82.
[549] <http://pactopormexico.org/como/> accessed 28 May 2017

agreements, divided into five main aspects. One of them was economic growth, employment, and competitiveness.[550]

The Pact established that the best tool to combat poverty was the generation of employment. Linked to this purpose, it was indicated that it was necessary to create a specialised tribunal in competition and telecommunications (made of two district courts, and two Collegiate Circuit Courts specialised in Economic Competition, Radiobroadcasting and Telecommunications), and this was listed as commitment number 38 of the Pact, with the following precise terms:[551]

"*Creation of specialised courts in economic competition and telecommunications.*

Reforms will be introduced to create specialised courts to provide more certainty to the economic agents by applying more efficiently, and with a more technically informed approach, the complexity of the regimes that regulate the telecommunications activities and the cases of violations to the economic competition regime (Commitment 38)".

The Pact was finally signed on 2nd December 2012, and then presented to the Mexican parliament for consideration on 11th March 2013. The initiative presented to the parliament incorporated commitments 37 to 45 of the Pact, highlighting the importance of legislating about information technologies and communications, as well as the powers that competition

[550] <http://pactopormexico.org/como/> accessed 28 May 2017
[551] <http://pactopormexico.org/como/> accessed 28 May 2017

authorities should have, so pursuing the modernisation of both state and society.[552]

The introduction of the initiative focused on reinforcing how a good telecommunications and radio-diffusion service impacts a country's development, highlighting what the current situation of the telecommunications sector in Mexico was like and how negatively it impacted on the advancement of the country. The initiative indicated that by giving more powers to the competition authorities the development of the telecommunications sector would be enhanced.[553]

Regarding the creation of the specialised competition and telecommunications tribunal, the initiative remarked that the parties aiming to gain time and to avoid the observance of the regulation as a path to obtain economic benefits had been requesting the review and suspension of the decisions.[554]

The initiative also indicated that the high number of cases had impeded the development of more competitive markets. Thus, the purpose of the creation of this tribunal was to avoid private parties participating in vital markets like telecommunications and radio-diffusion, and to stop abusing the judiciary system, so that decisions could be upheld.[555]

Equally, the purpose of creating a specialised competition and telecommunications tribunal was to avoid having contradictory decisions from diverse judges, which generated legal uncertainty by concentrating

[552] *Parliament Gazette*, XVI, 12 March 2013, 3726-II, 1
[553] *Parliament Gazette*, XVI, 12 March 2013, 3726-II, 4–20
[554] *Parliament Gazette*, XVI, 12 March 2013, 3726-II, 20
[555] *Parliament Gazette*, XVI, 12 March 2013, 3726-II, 20

the jurisdiction on solely this body. It was stated as well that competition and telecommunications matters were highly complex, so the creation of this tribunal would allow the specialisation required to deal with them.[556]

Examining the debates of this initiative inside the parliament, it has been noticed that aspects such as the suspension of the review decisions, and the implementation of indirect *amparo* against final decisions, were discussed. The debates about the *amparo* action were confined solely to the implications of the broad use of this legal tool against the decisions adopted by the Mexican competition authority. In this sense, some members of the parliament supported the proposal of admitting the *amparo* action only against its final decisions, while some others considered that it was against the constitution to limit the use of this significant tool.[557]

It was mentioned once as part of the debates inside parliament that the adoption of the specialised competition tribunal would mean the country would enjoy more competition, of better quality, and involving fewer costs.[558] However, even if these benefits were indicated, there was a lack of explanation and discussion around how the adoption of this type of judiciary would help to achieve them.

During the debates on 25th April 2013, aspects such as the *amparo* action and the suspension of the reviewed decisions were the topic of discussion

[556] *Parliament Gazette*, XVI, 12 March 2013, 3726-II, 22. It is worth mentioning that during the debates that occurred previous to the reform of the LFCE of 2011, when for the first time specialised competition tribunals were created, although not implemented, it was said that this jurisdiction *"...would be a guarantee of impartiality, efficiency, specialisation, and professionalisation…"*, see *Parliament Gazette*, XIV, 14 April 2011, 3242-III

[557] Diario de los Debates de la Cámara de Diputados, Ano I, Primer Periodo, 21 de marzo de 2013, 406, 409, 415

[558] Diario de los Debates de la Cámara de Diputados, Ano I, Primer Periodo, 21 de marzo de 2013, 421

again. There was no discussion about the adoption of the specialised tribunal.[559] Instead, the topic that was dominant during the debates on 21st March 2013 was the telecommunications sector, and the regulations that were introduced to it. In fact, the creation of the specialised competition and telecommunications tribunal was an initiative contained in a law project named the "*Telecommunications and Radio-diffusion Law*".[560]

The OECD has indicated that the specialised competition tribunal in Mexico was created to diminish the time required to obtain a review decision, and to improve the quality of such decisions.[561] To facilitate the performance of the recently adopted tribunal two vital constitutional reforms were also introduced.

The first was that through an *amparo* action it is only possible to suspend the effects of decisions made by the competition authorities with regard to imposition of fines, or disincorporation of rights, or shares.[562] Second, that parties are entitled to challenge only the final decisions made by the competition authorities using an indirect *amparo*,[563] such that an *amparo* action against intra-procedural acts or competition authorities' proceedings is not admissible.[564]

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[559] This is to the best of the author's knowledge, having reviewed all related parliamentary discussions, and the parliamentary activities around it such as those taken place on 25 March 2014, 26 March 2014, 22 April 2014, 25 April 2014, 29 April 2014, 9 February 2014, 20 February 2014, 11 March 2014, and 20 March 2014.

[560] Diario de los Debates de la Cámara de Diputados, Ano I, Primer Periodo, 21 de Marzo de 2013, 349

[561] OECD (n 474) 20

[562] *Official Gazette* June 2013, article 28 of the constitution.

[563] This indirect *amparo* has a first instance before a district court, and a second one before a collective district court or even before the Supreme Court, whose aim it is to review the constitutionality of the decision under scrutiny.

[564] *Official Gazette* June 2013. Also, the jurisprudence has repeatedly affirmed, *"...The amparo action is inadmissible against intra-procedural acts or final decision, except when the acts are impossible of reparation, because of the physical impairment – real and present- of substantive rights. It is also argued that the scope of an "intra-procedural act," used by the Legislative, is general, and hence, refers to any occurred within the progressive sequence of acts aimed towards the legal resolution of the matter, not only to those occurred during the trial-type procedure"*. See Gaceta del Semanario Judicial de la Federación, Libro 29, Tomo III, April 2016, jurisprudence I.1o.A.E.24 J/4 (10a)

To sum up, the initiative to adopt a specialised competition tribunal was grounded on issues of workload, quality, uniformity, and efficiency. Having questioned earlier, when analysing the main problems that the judiciary in Mexico experiences, whether aspects such as lack of independence, corruption, or capture were considered when adopting the specialised competition tribunal, now it is possible to affirm that these aspects were not mentioned to support the initiative, neither were they an object of debate inside parliament.

While the main focus of the discussions inside parliament was the telecommunications sector, the deliberations about the adoption of this type of judiciary were limited. Having explored the reasons that supported the creation of the specialised competition tribunal, Section 3.4.3 examines how the tribunal was designed.

3.4.3. DESIGN OF THE SPECIALISED COMPETITION TRIBUNAL IN MEXICO

As was mentioned earlier, a constitutional reform introduced in 2013 led to the adoption of a specialised tribunal in Economic Competition, Radiobroadcasting and Telecommunications.[565] This institutional reform reinstalled the appeal procedure by the affected parties aiming to challenge acts or omissions of COFECE through an indirect *amparo*.[566] Therefore, the decisions made by the competition authorities in Mexico, that is, the COFECE and the IFT, are now reviewed through indirect *amparo* by a specialised tribunal made of two specialised district courts at

[565] *Official Gazette* June 2013
[566] Mena (n 462) 17

first instance, and by two specialised Collegiate Circuit Courts at second instance. The final instance could be before the relevant Collegiate Circuit Court, unless the Supreme Court decides to assume jurisdiction.

For the establishment of the specialised district courts, and the specialised Collegiate Circuit Courts in Economic Competition, Radiobroadcasting and Telecommunications, the CJF was given 60 calendar days following the promulgation of the LFCE on 11th June 2013.[567] Accordingly, in August 2013 the CJF decided to terminate the duties of two administrative district courts, the fourth and the fifth, which were transformed into the first and second district courts on administrative matters specialising in Economic Competition, Radiobroadcasting and Telecommunications, respectively.[568]

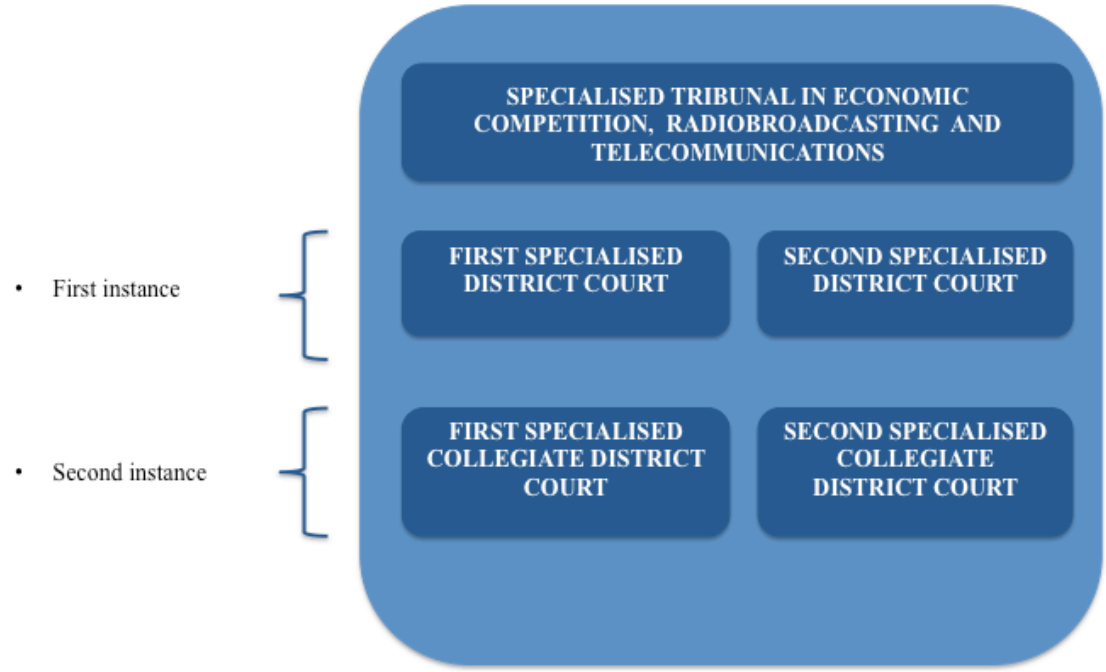
Similarly, the termination of the duties of the second and third administrative Collegiate Circuit Courts was decided, transforming them into the first and second Collegiate Circuit Courts specialised in Economic Competition, Radiobroadcasting and Telecommunications, respectively.[569]

Nevertheless, the adoption of this specialised competition tribunal merely signified the transformation of two pre-established administrative district courts and two pre-established administrative Collegiate Circuit Courts, rather than a change in their composition. Thus, the administrative jurisdiction of existing members of the judiciary was transformed, whereby two district courts (each comprising one judge), and two administrative Collegiate Circuit Courts (each comprising a three-

[567] *Official Gazette* June 2013, article 12 transitory
[568] General Agreement 22/2013
[569] General Agreement 22/2013

member panel) became specialised in Economic Competition, Radiobroadcasting and Telecommunications. Figure 3.3 shows the composition of the tribunal:

Figure 3.3: The Specialised Tribunal in Economic Competition, Radiobroadcasting and Telecommunications



It was also established that the newly specialised bodies would be based at the Federal District, having territorial jurisdiction across the Republic.[570] Similarly, it was stated that the members of the newly specialised tribunal would receive future training in Economic Competition, Telecommunications and Radio-diffusion to consolidate their specialisation.[571]

On 17th September 2013 the CJF established the following requirements for aspiring members of the specialised tribunal: i) to become a specialised judge, at least 10 years of experience as an administrative

[570] Articles 6 and 7 of the General Agreement 22/2013
[571] Article 7 of the General Agreement 22/2013

judge; ii) to become a magistrate, at least 15 years.[572] The tenure of the members was established as follows: i) three, a tenure of three years, ii) three, a tenure of two years and six months, and, iii) two, a tenure of two years.[573]

3.4.4. OVERVIEW OF THE REVIEW PROCESS BEFORE THE MEXICAN SPECIALISED COMPETITION TRIBUNAL

To properly understand the functioning of the new review process before the specialised competition tribunal, it is important to recall the main changes that were introduced. Firstly, in line with the LFCE of 1993, the parties of an investigation had the option to file reconsideration against the decisions made by the plenary of the CFC, which would be decided by the Plenum itself. This reconsideration had as an effect the suspension of the challenged decision until the reconsideration was issued.[574] The 2013 Constitutional Amendment eliminated the reconsideration before the plenum of the competition authority (known as an administrative appeal), and as a result the only way to challenge a decision issued by COFECE is through an *amparo* action.

Secondly, the constitutional reform of 2013 eliminated the possibility for the affected parties to request the review of the fines decisions before the TFJFA. Instead, the jurisdiction to revise these types of decisions was given exclusively to the newly created specialised competition tribunal.

[572] Article 4 of the General Agreement of 7 August 2013, established as requirements to be elected, the years of experience in the judicial career, the outcomes of the inspections that as judges received during the last five years, and studies on administrative matters, or on economic competition, radiodiffusion, or telecommunications.
[573] Communication No. 23 of 27 September 2013, Federal Judicature Council
[574] Article 39 LFCE 1993

Thirdly, district courts and Collegiate Circuit Courts specialised in Economic Competition, Radiobroadcasting and Telecommunications were given exclusive nationwide jurisdiction to review the decisions made by the COFECE and the IFT. Similarly, the use of indirect *amparo* action was made available only against final decisions, and the suspension of the decision was therefore made less likely.

Having determined the main changes that were introduced to the review process, what remains is a general description of that process as it stands today. Thus, once the competition authorities have made their final decision, the dissatisfied party can challenge it in indirect *amparo* before the district courts on administrative matters specialised in Economic Competition, Radiobroadcasting, and Telecommunications, who have jurisdiction at first instance.

Then, if the parties disagree with the decision issued at first instance, there is a second instance before the Collegiate Circuit Courts specialised in Economic Competition, Radiobroadcasting and Telecommunications. This instance before the collective circuit courts may constitute the end of the review process, unless the Supreme Court claims jurisdiction.

If the plaintiff is successful, the specialised competition tribunal will annul the decision that violates the specific right, and COFECE will issue a new one, without repeating the infringement,[575] meaning that there is no transference of competence from the authority to the court. In the case of the review decision concluding that the source of the violation is the law or a regulation being challenged, then COFECE will not be able to apply

[575] Peredo, Gutierrez, and Gonzalez (n 460) 314.

it again.[576] At this point it is important to remember that under the *amparo* action procedure the effects are limited to the plaintiff in question (as described in Section 3.2.2), it being necessary for anyone else seeking the same remedy to present a separate *amparo* action.[577] Finally, the reform clarified that civil actions filed to recover compensatory damages arising from anticompetitive conduct would be solved by the specialised competition tribunal.[578]

3.4.5. CONCLUDING REMARKS

Before the constitutional reform of 2013, the levels of enforcement of the competition regime in Mexico were very low, for various reasons. First, the numerous possibilities that the involved parties had to request the revision of the different decisions made by the CFC throughout the process, including not just final but also intra-procedural stages.

Second, the fact that a significant number of the decisions made by the CFC were subject to being revised, and their implementation suspended, making of the CFC a weak competition authority. Third, the length of the process and the impossibility of implementing the decisions combined with an unwillingness to observe the competition law, and against a backdrop of fines that never represented a sufficient deterrent mechanism.

Fourth, the compromised quality of the review process. The novelty of the regime, added to the fact that the judiciary faced a high workload, meant that in some cases the review decisions neglected the analysis of

[576] Ibid.
[577] Taylor (n 397) 151
[578] Peredo, Gutierrez, and Gonzalez (n 460) 314

substantive issues, and cases were therefore disposed based on pure procedural failures.

In March 2013 the government, pursuing economic growth and competitiveness, presented a packet of proposals known as the "*the Pact for Mexico*". Among them, the creation of autonomous and more powerful competition authorities, and the creation of a specialised competition tribunal seeking to improve the levels of efficiency, quality, and uniformity of the review process.

The initiative was studied by the parliament, whose debates did not show great attentiveness to the adoption of the specialised competition tribunal. As was indicated, the adoption of this type of judiciary was introduced as part of a telecommunications reform, and a large part of the discussions were focused on this sector.

Moreover, the initiative was supported and the constitution reformed by introducing a tribunal specialising in Economic Competition, Radiobroadcasting, and Telecommunications. The reform was implemented by transforming existing administrative district courts and Collegiate Circuit Courts into this new specialised field, by which future training was contemplated as a part of the specialisation process. The institutional reform was also accompanied by a constitutional reform limiting the admissibility of an indirect *amparo* action to final decisions made by the competition authorities, and making its suspension exceptional.

In spite of the institutional reform that internally separates the investigative body from decision-making within COFECE, the institution

still possesses the capacity to decide cases and allocate rights. Given the executive's interference in COFECE's enforcement activities, combined with the absence of a tradition of analytical rigour from the judiciary through judicial review, it seems that the delegation of the judicial review to a specialised judiciary was necessary to ensure that the enforcement activities were correctly exercised.

3.5. CONCLUSIONS

This chapter has shown that the executive and the judiciary interfered in the enforcement activities in Mexico, perhaps producing a historically weak competition culture that was both damaging and difficult to overcome. Similarly, a legal tool that was devised to protect constitutional rights in Mexico turned out to be a very successful instrument used by astute practitioners to reduce the performance of the Mexican competition authority, and the effectiveness of the competition regime. It appears that the combination of these circumstances reinforced the lack of competition culture embedded in Mexico. Or perhaps these circumstances were just a reflection of the deep lack of competition culture afflicting this country.

Hence, the adoption of a specialised competition tribunal was relevant given the circumstances. Nonetheless, it is interesting to see the deficiency of the deliberations inside the Mexican parliament about the necessity or suitability of adopting a specialised competition tribunal, and the scarcity of evidence aiming to persuade its approval. The parliamentary deliberations show that the adoption of a specialised competition tribunal would not have been sufficient to address the shortcomings of the Mexican competition regime without a constitutional

reform modifying the admissibility of the *amparo* action in antitrust cases, and its suspension. Additionally, it is important to mention that considering the new powers given to COFECE, the adoption of a specialised competition tribunal was an appropriate institutional design seeking to promote a system of checks and balances through an expert judicial challenge.

In terms of the institutional design of the tribunal, pre-established administrative courts were transformed into specialised competition courts whose members had more than 10 or 15 years of experience in the judiciary as administrative judges. While choosing such experienced judges for the new tribunal was a wise decision, starting their training after the specialised tribunal began functioning was not. This transformation means that the generalist judges before reviewed antitrust cases are now the specialists, providing this research project with the unique opportunity to investigate their insights about the encounter of antitrust cases both before and after the transformation, and to assess the performance of this tribunal, which is the goal of the next chapter.

CHAPTER 4

Mexico: empirical analysis

INTRODUCTION

This chapter examines whether establishing a specialised competition tribunal in Mexico has been beneficial in terms of efficiency, quality, and uniformity, as well as whether such a tribunal has been captured. Lawrence Baum has described these three factors as the neutral virtues of specialisation, and loss of independence as a drawback.[579] Yet, these claims remain unsupported by evidence. For this reason, this research project has focused its efforts on verifying the factors through the analysis of the insights of some key stakeholders.

The analysis also reveals that in Mexico it was very unlikely that generalist tribunals would outperform specialist ones given the severe lack of competition knowledge, and the insufficient levels of exposure to antitrust cases amid the judiciary. If this is the case in some other Latin American countries, then based on the experience provided by the Mexican example, specialised competition tribunals could be advisable for them.

These findings evolved after assessing the feedback of the following stakeholders who were interviewed during fieldwork that took place in Mexico City in March 2017:

i) Four out of six members of the specialised competition tribunal;

[579] Baum (n 7) 32–33, 37

ii) Four out of seven commissioners of the competition authority COFECE, and two members of the investigation authority of COFECE; and
iii) Five practitioners.

Such assessment, as well as contributing to the findings of this chapter, achieves three more goals. First, it remedies the scarcity of empirical evidence about the real benefits and drawbacks of specialised tribunals. Second, it provides a good understanding about the foundation and extent of the most significant deficiencies of the Mexican judiciary that provoked the adoption of such institutional reform in Mexico. Third, it offers to Latin American countries the opportunity to benchmark the nature and dimension of their deficiencies in the implementation of competition law, and to use the experience of Mexico as useful reference to solve the issue.

Such contribution builds on the empirical evidence collected over the course of 15 semi-structured interviews conducted from 9th March 2017 to 4th April 2017 in Mexico. The assessment combines the performance feedback collected during the fieldwork with the analysis offered in previous chapters. In terms of methodology, a questionnaire containing similar questions was addressed to all of the stakeholders, and the answers were analysed in their respective groups. Considering that the perspectives of the tribunal insiders and the tribunal outsiders have a different value when testing their reliability, this separation of the collected data is justified.

As an illustration, the proposition consisting of specialised competition tribunals being more efficient, providing better quality decisions, and

being more uniform, needs to be analysed prudently, as some biases could affect the assessment of the given opinions.[580] It is plausible that the members of the specialised competition tribunal may be inclined to endorse the court's performance, while the practitioners may undermine it based on how favourable the decisions have been to them.

Equally, the levels of satisfaction shown by the members of the competition authority (COFECE) and the practitioners need to be studied in depth. These participants could be very critical when providing feedback about the performance of the specialised competition tribunal. This reason validates the appropriateness of evaluating their perceptions independently.

Beyond possible partialities, one more reason why the answers given by the interviewees are analysed separately is that this allows a more comprehensive analysis of the opinions provided by the members of the specialised competition tribunal, whose input for the purpose of this research project is crucial considering that they reviewed antitrust cases as generalist judges, and subsequently as specialists. As explained in Section 3.4.2, in August 2013 the CJF decided to terminate the duties of two administrative district courts, the fourth and the fifth, and transform them into the first and second district courts on administrative matters specialising in Economic Competition, Radiobroadcasting and Telecommunications, respectively.

Similarly, the termination of the duties of the second and third administrative Collegiate Circuit Courts was decided, transforming them

[580] <https://academic.oup.com/jpubhealth/article/27/3/281/1511097> accessed 11 February 2019; H Brink, 'Validity And Reliability In Qualitative Research' (1993) 16 Curationis 2, 35–37 <https://curationis.org.za/index.php/curationis/article/view/1396> accessed 11 February 2019

into the first and second Collegiate Circuit Courts specialised in Economic Competition, Radiobroadcasting and Telecommunications, respectively.

One last reason for this engagement with the collected data is because by grouping the interviewees and their answers, this research project benefits from clearly identifying the differences in understanding, approach and perspective of the different groups.

Also, by comparing or contrasting the different perspectives, the analysis is more stimulating. In this sense, three groups of interviewees have been created, that is, practitioners, COFECE, and the tribunal.

The Excel™ table that serves as a repository shows 15 columns presenting the answers to the respective questions. For 11 of the questions, the interviewees had the opportunity to say yes or no, and to expand on their reasons. The remaining 4 columns relate to open questions, where the participants responded to the following areas: Column 2 (efforts made to adopt the specialised competition tribunal); Column 4 (the most important input provided by such a tribunal); Column 5 (what could be improved); and Column 6 (what would be the situation without this tribunal).

The answers given by the participants are easily identifiable using the Excel™ table, where the number of affirmative answers (yes) or negative (no) permits a calculation as to how many times such answers were repeated in relation to a particular question. This is then used to determine percentages. In the context of open questions, the number of times a factor was mentioned gives it its weight. To illustrate this

dynamic, when analysing the most important input provided by the specialised competition tribunal this researcher accounted for how many times efficiency, quality or uniformity were indicated.

This chapter is divided into five main sections. Section 4.1 explores the perceptions of the interviewees in relation to the complexity of competition law. Section 4.2 examines whether the specialised competition tribunal has been beneficial in terms of efficiency, quality, and uniformity. Section 4.3 studies whether the specialised competition tribunal has lost its independence. Section 4.4 surveys whether the interviewees consider the adoption of specialised competition tribunals in Latin American countries advisable. Concluding remarks are presented at the end of each section, and at the end of the chapter.

4.1. IS COMPETITION LAW A COMPLEX FIELD?

Section 2.2 exposed as a key finding the significant number of arguments in favour and against specialisation in competition law, particularly with regard to the complexity factor, which illustrates the unsettled nature of the debate around this issue. At one end of the spectrum, there is a cluster of scholars arguing that the predominant use of economics turns competition law into a complex field and imposes the necessity of creating specialised tribunals.[581] Such an argument has been reinforced by the shared claim among competition authorities, particularly in developing countries, that their decisions are being persistently wrongly overturned due to the lack of competition knowledge and economics

[581] Kaplow (n 249) 184–188; Jenny (n 250) 78–79; United Nations (n 250)

among the judiciary, a situation that impedes the development of their competition regimes, and increases the litigation costs.[582]

At the other end of the spectrum, Section 2.2 presented the arguments of those scholars who argue that specialisation in competition law is not necessary. They argue that all judges have the capacity to solve any type of case simply by recourse to a sense of fairness,[583] and that not all the antitrust cases are based on economic issues,[584] and that the practitioners should present the cases in sufficiently clear a manner that any judge should be able to understand them.[585]

This section helps progress the debate by establishing that in Mexico the magnitude of novelty and complexity of competition law made necessary the adoption of a specialised competition tribunal. This finding emerged after testing the divergent theoretical insights against the backdrop of extensive empirical research collected in Mexico.

The next part provides the opinions given by the members of the specialised competition tribunal, then by the members of COFECE, and finally by the practitioners, about how complex they perceive competition law to be in Mexico.

Members of the specialised competition tribunal

[582] ICN (n 261) 9
[583] Wood (n 11) 7
[584] OECD (n 19) 70
[585] Rakoff (n 12) 7–9

To preserve the anonymity of the four members of the specialised competition tribunal who agreed to be interviewed for the purpose of this research project, they are named as member A, B, C, and D.

All members of the Mexican specialised competition tribunal who were interviewed agreed that competition law is a complex field. At the same time, two out of four also indicated that the use of economics is characteristic of this field. This complexity and use of economics justifies the adoption of a specialised competition tribunal, as Member A[586] indicated: "*...In my opinion, without any doubt, it is more beneficial that these types of matters be solved by a specialist, because they require a better knowledge of regulatory law, economic law, and economic matters…*"

Member A also considered that antitrust cases and regulatory matters require a particular economic and legal reasoning that only specialisation provides. In her opinion, an insufficient analysis of the legislation and the economics means that generalist judges appreciate these types of cases differently, and thus it is preferable that specialists who have specific knowledge solve them.

Her opinion was also rooted in the fact that competition law and economics evolve quickly, requiring constant training in the legal framework and the economic theories. This member gave special emphasis to the fact that economics nourishes competition law by affirming that "*...Any judge who reviews the legality of competition law needs to know the phenomena that are being regulated. Specific training is required then to understand the economic phenomena…*"

[586] Interview held 10 March 2017, Mexico D. F.

In turn, Member B[587] referred to the complexity of competition law by providing the following personal account of dealing with an antitrust case as a generalist magister: "*...I was in a general tribunal, and I had to solve a really interesting case about a monopolistic practice regarding a Peruvian soft drink. On this occasion one of my clerks was dedicated to researching the topic for four months. We did not know much, and had to investigate a lot… [So] that was difficult, and impeded that the tribunals had the time, and the disposition to study this and some other complex matters that we were not used to dealing with…*"

Similarly, Member D[588] referred to the complexity of this field by indicating that "*...competition issues require a technical knowledge and an understanding of the domain of some other disciplines, and these disciplines are unknown to generalist judges. So there is a huge distance from the training that a Mexican judge receives and the training that a specialist judge in competition law requires. The training is intense, and this type of training would not be possible if we were generalist judges. We did not have time…*". As indicated in Section 3.4.3, Article 7 of the General Agreement 22/2013 established that future training would be provided to the members of the specialised competition tribunal (to address one weakness already identified), and this member of the tribunal confirmed that they have been receiving such training.

From the opinions given by the court insiders the following common and relevant themes made necessary the adoption of a specialised competition tribunal in Mexico: i) competition law requires a specific knowledge, and

[587] Interview held 10 March 2017, Mexico D. F.
[588] Interview held 15 March 2017, Mexico D. F.

a specific reasoning; ii) generalist judges do not have such specific knowledge and reasoning; iii) the application of competition law requires an understanding of economics, and if generalist judges lack economic knowledge, then this application is more difficult; iv) competition law evolves quickly, so judges need constant training; v) judges are overloaded and do not have much time to investigate or to be trained; vi) the training received as generalists in competition law is insufficient compared to the training received as specialists; vii) the low levels of exposure to antitrust cases make a good understanding of competition law in the short term unlikely.

The members of the Mexican competition authority – COFECE

To preserve the anonymity of the members of the competition authority (COFECE) who took part in the interviews for this research project, they will be named as COFECE A, B, C, D, E, and F.

Four out of six members of COFECE clearly indicated that competition law is a complex matter. One of the reasons given to support this claim was the novelty of this regime in Mexico, as COFECE B[589] stated "*...I think that because of the novelty of the law – the law project dates from 1992 and was applicable in 1993 – it was very difficult for the judges to understand the matter, it was really complicated...*"

COFECE A[590] gave herself as an example in order to illustrate how complicated competition law may be: "*I will use myself as an example; I have been trained to deal with these types of cases. But when I first came*

[589] Interview held 13 March 2017, Mexico D. F.
[590] Interview held 10 March 2017, Mexico D. F.

to the commission it took me six months to understand exactly what I was doing here, all the concepts, I mean it is really complicated, it is not easy…"

Equally, COFECE C[591] referred to the complexity of competition law by indicating "*...I think that competition law and regulation are very complicated matters, and sometimes it is difficult for a practitioner to process them…*"

Three important deductions can be made from the opinions given by the members of COFECE. First, that competition law is a novel matter in Mexico. Second, that if for the members of the competition authority competition law is a complex field, having been trained in this area and designated after a robust selection process, for someone who does not have at least a basic knowledge of this area the analysis of antitrust cases must be even more complicated. Third, that for the Mexican practitioners, competition law and regulation is a difficult matter.

- *Use of economics*

Two out of four interviewed members of COFECE indicated that the use of economics when dealing with antitrust cases is implicit. For instance, COFECE B stated that the competition regime is an economic regime translated into a legal framework. In her words: "*...I am coming back to my fundamental topic: the Mexican competition regime is an economic law translated into a juridical language, and in that sense, I am not really sure that the judge is familiar with this economic aspect…*"

[591] Interview held 14 March 2017, Mexico D. F.

Another member of the commission suggested that when reviewing antitrust cases judges put so much emphasis on the law, while abandoning the study of the economic aspects, which are complicated, and which need a different analysis. This was the suggestion made by COFECE D[592] "*All the judges on administrative matters are focused on the same: constitutionality, legality, laws, constitution. But I think that as specialists, as the name implies, they start knowing about and understanding the economic aspect that is implicit in this specific field of the law… the focus or the analysis is different…*"

At the same time, one more member of the commission proposed that the fact that economics is not part of the law programmes resulted in one of the first and main obstacles experienced when the competition regime was established in Mexico in 1993. This commissioner expressed "…*one more complication is that at least in Mexico the law career does not involve economics. So it is shameful, we started to deal with antitrust cases, and the lack of economic knowledge made the application of the law more difficult…*"

Finally, COFECE E…[593] delivered a robust position relating to the use of economics when dealing with antitrust cases, indicating that besides knowing the competition law, the knowledge of economics was indispensable. Her position was this: "...*The competition law field is more complex than some other fields of law, it's not just about law and competition law, it is necessary to know about economics and some specific knowledge is required… [In] my opinion that impedes the*

[592] Interview held 13 March 2017, Mexico D. F.
[593] Interview held 23 March 2017, Mexico D. F.

specialisation that allows judges to produce review decisions with a deep analysis, and greater accuracy. That is my perception…"

From the comments given by the members of the competition authority, it emerges that the use of economics is intrinsic to competition law, and a deficient knowledge of it could weaken a proper analysis of an antitrust case.

The practitioners

To preserve the anonymity of the practitioners who took part in the interviews for this research project, they will be named as practitioner A, B, C, D, and E.

Four out of five practitioners considered competition law to be a complex field. Practitioner A[594] stated that awareness of the complexity of the matter was one of the main reasons why the Mexican competition authority encouraged the adoption of a specialised competition tribunal, an aspect that was mentioned again by the same interviewee when she clearly stated: "*…this is a complex matter…*"[595]

Equally, Practitioner B[596] stated that telecommunications and competition law are complex matters, adding that if the specialised competition tribunal had not been created, the complexity of the matter would be a current issue considering that tribunals without knowledge would be reviewing antitrust cases.[597] This practitioner at a later stage of the

[594] Interview held 23 March 2017, Mexico D. F., answer to question 2
[595] Interview held 23 March 2017, Mexico D. F., answer to question 6
[596] Interview held 9 March 2017, Mexico D. F., answer to question 1
[597] Interview held 9 March 2017, Mexico D. F., answer to question 4

interview clearly indicated that: "*...these matters are complex...*" and that "*...these cases could be technically complex...*"[598]

Finally, Practitioner E[599] expressed that competition law is a complex field, recognising that there are also other fields of law equally complex, but the fact that economics is involved in competition law makes the adoption of a specialised competition tribunal desirable. She stated "*...In competition law you could find legal-economic cases, which are really complex. I am not suggesting that some other fields of law are not complex but the use of economics makes specialisation convenient...*"

The practitioners' reflections about the complexity of competition law presented here coincide with the undisputed position presented by the members of specialised competition tribunal, and the members of the competition authority, whose analyses were shown earlier in this section.

- *Use of economics*

Four out of five practitioners interviewed agreed that the use of economics in competition law is characteristic. In this regard, Practitioner B expressed that generally competition law contains wide-ranging economic concepts, whose interpretation requires a profound knowledge from the judges who undertake the review process.[600]

Practitioner C also denoted the use of economics and its technicalities as a proper part of the competition field.[601] To exemplify this assertion,

[598] Interview held 9 March 2017, Mexico D. F., answer to question 6a
[599] Interview held 4 April 2017, Skype, answer to question 6
[600] Interview held 9 March 2017, Mexico D. F., answer to question 3
[601] Interview held 23 March 2017, Mexico D. F., answer to question 2a

Practitioner C mentioned that if a generalist judge does not have a good understanding of these technicalities, it would be more difficult to expect an accurate definition of basic concepts such as relevant market or competitors.[602]

At the same time, Practitioner D proposed that special training in economics is required if generalist judges are to aspire to become specialists in competition law.[603] Finally, Practitioner E[604] pronounced that competition law has a strong economic component, observing that some antitrust cases may offer difficult legal-economic issues to be solved.[605]

The consensus from the practitioners about the essential use of economics in competition law, and about the lack of such knowledge amid generalist judges, enables the verification of the assumption that due to the complexity of the matter the adoption of a specialised competition tribunal in Mexico was necessary.

4.1.1. CONCLUDING REMARKS

The first key finding of this section is the confirmation that competition law is perceived as a complex field due to the involvement of economics. Members of the courts as well as members of COFECE and practitioners shared this position. The significance of this finding resides in the fact that the members of the competition tribunal revealed how difficult it was for them as generalists to undertake the review of antitrust cases due to

[602] Interview held 23 March 2017, Mexico D. F., answer to question 6
[603] Interview held 15 March 2017, Mexico D. F., answer to question 6
[604] Interview held 4 April 2017, Skype, answer to question 1
[605] Interview held 4 April 2017, Skype, answer to question 6

the involvement of economics, as well as in the fact that expert court outsiders state that generalist judges in Mexico do not have the knowledge required to solve the unique technicalities involved in antitrust cases.

Taking the answers as a whole, it has been determined that 82.2% of all interviewees considered that in Mexico competition law is a complex field. This average percentage derives from the percentages presented by each group. Thus, 100% of the members of the specialised competition tribunal, 66.6% of the members of COFECE, and 80% of the practitioners agreed with the statement.

It is important to indicate that none of the interviewees stated the opposite. That is, the 33.4% of members of COFECE and 20% of practitioners who did not clearly state that they considered competition law to be a complex regime did not suggest the contrary. A special feature that needs to be underlined is that the majority of the members of the specialised competition authority considered the competition regime to be a complex field.

Lack of competition knowledge, lack of training, low levels of exposure to antitrust cases, and high workload have intensified the complexity of the matter, making the adoption of the Mexican specialised competition tribunal necessary. The next section assesses whether the apparent virtues assigned to specialised tribunals – efficiency, quality, and uniformity – are real according to the Mexican case.

4.2. THE MEXICAN SPECIALISED COMPETITION TRIBUNAL: BENEFITS

Section 2.1 established the lack of conclusive empirical evidence as to whether specialised tribunals outperform generalist ones. This section makes some progress by showing that the interviewees consider that the judicial review has improved in terms of efficiency, quality, and uniformity following the adoption of the specialised competition tribunal in Mexico. The structure of this chapter reflects the chosen approach regarding the analysis of the relevant data, focusing on aspects of efficiency, quality, and uniformity.

4.2.1. EFFICIENCY

As the theoretical analysis in Chapter 2 suggested, a specialised judge would be more efficient as specialisation may help to more quickly foresee the main issues of a case, and therefore to anticipate the answers. At the same time, it would be easier for a specialised judge to understand complex and technical matters, which would translate into faster decisions.[606] This section confirms such assumptions after testing the relevant theoretical insights against the perceptions of the stakeholders about how specialisation has enhanced the efficiency of the Mexican specialised competition tribunal. A more detailed examination of the perceptions is presented next.

The members of the specialised competition tribunal

[606] Ginsburg and Wright (n 213) 793–795; Baum (n 7) 32–33

Two out of four members of the specialised competition tribunal who were interviewed referred to this point. In particular, Member C[607] affirmed that it is more likely that a specialised judge will make quick decisions in competition law, as a generalist judge does not have the proper training, nor enough experience or time to devote to such complex matters. In her words: "*...I think that if a generalist judge has the type of training that we have had and has good experience then they could make good decisions, but she is not going to be that quick, because she has so many other matters to look into, and this is going to diminish the efforts to try to solve a complex matter such as competition law. I am quite sure that it could be done, but may be not that quick. Experience works, and counts so much*". She added "*...to be able to make a quick and more in-depth decision, we need specialisation...*".

The second member to refer to this point was Member B, who provided an example of how much time was required to investigate a monopolistic practice to be able to understand the case. Four months were dedicated to the research alone.[608] Considering the workload that the judiciary in Mexico faces, as explored in the Section 3.2.4, it becomes evident that investing four months in the necessary research to solve a single case is inefficient and impacts negatively on the justice service, as the rest of the cases are neglected or delayed.

In this sense, based on the comments given by the members of the specialised competition tribunal, it seems that specialisation, at least in competition law, enhances efficiency. Having established that half of the members of the competition tribunal who were interviewed considered

[607] Interview held 13 March 2017, Mexico D. F.
[608] Interview held 10 March 2017, Mexico D. F.

that a better understanding of this complex field impacts positively the time required to review antitrust cases, the next part explores the perceptions of the members of COFECE.

The members of the Mexican competition authority – COFECE

One member of the commission gave an example of how the understanding of this field may translate into faster decisions. This member indicated, "…*We as commissioners, case after case, start seeing the differences from just one word, one phrase. Things that may seem similar could be different…*"[609]

This observation highlights that examining antitrust cases regularly gives the advantage of easily recognising the source of the issues, as well as the veracities or subtle inconsistencies that may emerge from the arguments presented by the parties involved in antitrust cases. In this sense, a better understanding of competition law suggests quicker decisions.

The practitioners

Practitioner D asserted that the creation of the specialised competition tribunal in Mexico has enhanced the efficiency of the review process, considering the complexity of the field.[610] This assertion validates the tested assumption.

To conclude, 28% of the total interviewees indicated that an understanding of the complexities and technicalities of competition law

[609] COFECE A
[610] Practitioner D, answer to question 5

would facilitate a quicker review process. This average percentage was comprised as follows: 50% of the members of the specialised competition tribunal, 16% of the members of COFECE, and 20% of the practitioners. The fact that the remaining percentage of interviewees did not refer to this topic does not mean that they did or did not agree with it.

Additionally, two more questions were addressed to all the interviewees which sought to (i) explore the most important contribution that the specialised competition tribunal has made: a) "*What do you think has been the most important contribution of the recently adopted specialised competition tribunal in Mexico to the Mexican competition regime? Explain*." To this question, three out of six members of COFECE, and two out of four members of the specialised competition tribunal referred to efficiency as one of the most important inputs that the specialised competition tribunal has offered to the Mexican competition regime.

And, (ii) to establish what the situation would have been if the specialised competition tribunal had not been created: b) "*What do you think would be the situation of the competition regime in Mexico if the specialised competition tribunal had not been created? Explain.*" To this question, three out of six members of COFECE, two out of four members of the specialised competition tribunal, and one out of five practitioners mentioned that the levels of efficiency shown by this new specialised tribunal would not have been possible to achieve, or, in other words, that the length of the review process would be the same.

Looking at their words in more detail, COFECE A[611] said: "*...if we had continued like before…I think that we had the same issue, cases lasting ten years, which obviously is not the best, and basically solving the procedural, not the substantive issues…*". COFECE B[612] indicated that the length of the review process as it previously existed translated into denied justice. Finally, COFECE E[613] indicated that before the adoption of the specialised competition tribunal the review process was characterised by persistent delays.

Member A of the specialised competition tribunal expressed that without the adoption of the specialised competition tribunal the review process would be less efficient.[614] Member D also described this situation, suggesting that in the absence of the specialised competition tribunal the review process would continue to display significant delays.[615] Practitioner D indicated that the adoption of a specialised competition tribunal has helped to achieve a more efficient competition regime in Mexico.[616]

Finally, Practitioner C[617] stated: "*Yes, the efficiency has improved…*", and Practitioner D[618] said: "*Yes, despite voluminous and technically complex cases, they try to solve them on time…*"

An examination of the answers to the questions addressed to all the interviewees, and in particular to the practitioners, gives these results:

[611] COFECE A, Interview held 10 March 2017, Mexico D. F., answer to question 4
[612] COFECE B, Interview held 13 March 2017, Mexico D. F., answer to question 4
[613] COFECE E, Interview held 23 March 2017, Mexico D. F., answer to question 4
[614] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 4
[615] Member D, Interview held 15 March 2017, Mexico D. F., answer to question 4
[616] Practitioner E, Interview held 4 April 2017, Skype, answer to question 4
[617] Practitioner C, Interview held 23 March 2017, Mexico D. F., answer to question 4.a
[618] Practitioner D, Interview held 15 March 2017, Mexico D. F., answer to question 4.a.3

83.3% of the practitioners consider that the adoption of the specialised competition tribunal in Mexico has improved the review process in terms of efficiency. Practitioners A, C, and D affirmed this when answering the question about the impact that the adoption of this tribunal may have had in terms of efficiency, and Practitioner E referred to efficiency as an objective that would not have been achieved had the specialised competition tribunal not been created.

Practitioner B was not asked about this particular topic, as from the beginning of the interview she indicated that considering the recent creation of the specialised competition tribunal, it was too early to evaluate the performance. In relation to the members of COFECE, 83.3% expressly agreed that the review process undertaken by the new specialised competition tribunal in Mexico was more efficient than before. Two of its members indicated that without its creation the levels of efficiency so far would not have been achieved. One member mentioned efficiency as one of the main inputs that the creation of the specialised tribunal had given to the competition regime in Mexico, and another member answered positively to the question about the implications of the adoption of the tribunal in terms of efficiency.

There was one member who did not mention efficiency as a specific benefit of the specialised competition tribunal. Nevertheless, during the interview she referred to the intense length of time that had characterised the review process before the adoption of the legal reforms. This could imply that she considered the tribunal to have increased efficiency, but to avoid misunderstandings her opinion will not be calculated.

Thus, 83.3% of the members of COFECE and 83% of the interviewed practitioners considered that the adoption of the specialised competition tribunal in Mexico had been beneficial in terms of efficiency. If the answers given by the members of the specialised competition tribunal had been included, then the figure would have been 72% of interviewees.

4.2.1.1. CONCLUDING REMARKS

The main finding to come from the analysis of the opinions given by the different groups of stakeholders is that the review process as undertaken by the specialised competition tribunal in Mexico is more efficient than when the same process was undertaken by generalist judges.

At the same time, the fact that two members of the specialised competition tribunal estimated that the review process is now more efficient is significant. This is because these members were administrative judges before, and now as specialists have had the opportunity to compare their own performance.

A particular finding to be highlighted was the high number of both practitioners and members of COFECE who considered that the specialised competition tribunal is more efficient, since they have had the opportunity to compare the performance of this tribunal with the performance before its adoption. Considering that they could in fact be very critical of it, such a finding is significant.

4.2.2. QUALITY

Section 2.1.1b identified quality as one of the benefits that some scholars have attributed to specialisation. The benefit arises from the apparent ability of a specialised judge to more quickly recognise the source of the issues subject to controversy, and presumably also from the ability to ponder more quickly and with more accuracy the veracity of the arguments presented by the parties, thanks to an in-depth knowledge of the matter.[619]

It has also been stated that there is a lack of empirical evidence to corroborate or refute this claim.[620] This statement has been given in conjunction with the clear recognition of how difficult it would be to assess the quality of a judicial decision, which is clearly not the purpose of this research project. However, the perception of the majority of interviewees for this research project is that the new specialised competition tribunal has improved the review process in terms of quality.

The analysis starts with the following question: "*From your point of view, are there differences in relation to the 'quality of the decisions' made by the recent specialised competition tribunal in Mexico, compared to the decisions made previously by generalist judges?*" A detailed examination of the answers to this question is presented next.

In relation to the practitioners, four out of five stated that there were differences, which tends to show that the quality of the review competition decisions has improved. Practitioner A clearly stated that there was an important difference in terms of quality, stressing that the new specialised tribunal better analyses and applies the competition

[619] Cheng (n 221) 4–5; Savrin (n 214) 116–117; Zimmer (n 216) 2
[620] Baum (n 226) 1681–1683

regime, recognising also that in the past there had been good review decisions, but at the same time '*catastrophic*' ones, which, according to her, is no longer the case.[621]

Practitioner B also indicated that she has noticed a big difference in terms of quality, highlighting that now the decisions solve the substantive issues of the matter thanks to a better understanding of the conflicts and the problems inherent within them.[622]

Practitioner D noted that in general terms she has perceived a difference. She explained that in the past there were good review judgments deserving to be published, but also a significant number of review decisions that, perhaps due to a lack of knowledge or high workload, were solved based on procedural failures rather than on the substantive issues of the matter. This situation seemed less common after the adoption of the specialised competition tribunal, thanks to an understanding of the technicalities of the field.[623]

Practitioner E indicated that there has been an improvement in the quality of the decisions, noticing a more in-depth analysis of economic matters, which thereby makes them comparable to those made in other jurisdictions at a global level, thanks to a better understanding of the field.[624] On the contrary, Practitioner C expressed that she has not noticed any difference in the quality of the review decisions after the adoption of

[621] Practitioner A, Interview held 13 March 2017, Mexico D. F., answer to question 5
[622] Practitioner B, Interview held 13 March 2017, Mexico D. F., answer to question 5
[623] Practitioner D, Interview held 15 March 2017, Mexico D. F., answer to question 5
[624] Practitioner E, Interview held 4 April 2017, Skype, answer to question number 5

the specialised competition tribunal. Comments were not given to support her claim.[625]

Regarding the points of view of the members of COFECE, all of them indicated that with the adoption of the specialised competition tribunal there is a difference in terms of the quality of review decisions. They noticed an improvement, where the focus is less on procedural issues and more on substantive ones, and perceived a more thorough analysis of the cases.

In particular, COFECE A indicated that the improvement is observed from the fact that now it is not necessary to explain basic concepts, which was not the case before the adoption of the specialised competition tribunal. She stated that this improvement allows for conversations where similar language is used and understood.[626]

COFECE B expressed that before the adoption of the specialised competition tribunal, despite the fact that the judges were not well prepared, some of them were highly interested in the field and therefore there were some good review decisions. However, she noted that there was a trend to solve the cases based on procedural failures, combined with multiple and contradictory interpretations of the law.[627]

COFECE C stated her perception that the quality of the review decisions has improved, considering that the selected members of the competition tribunal were the best among all the candidates who took part in the

[625] Practitioner C, Interview held 23 March 2017, Mexico D. F., answer to question 5
[626] COFECE A, Interview held 10 March 2017, Mexico D. F., answer to question 5
[627] COFECE B, Interview held 13 March 2017, Mexico D. F., answer to question 5

selection process.[628] COFECE D also indicated that it is possible to distinguish whether a review decision was made before or after the adoption of the specialised competition tribunal by exploring how deep the analysis was, which according to her, is more in-depth these days.[629]

COFECE E mentioned that in general the quality of the review decisions has improved. She explained that before the adoption of the specialised competition tribunal there were good review decisions, but at the same time there were review decisions where the analysis was limited.[630]

COFECE F expressed that the review decisions made by the specialised competition tribunal are better in terms of quality. She noted that the decisions made by this tribunal show a good understanding of advanced concepts in competition law, and a more in-depth analysis.[631]

In relation to the opinions given by the members of the tribunal, one of them was reluctant to indicate whether she had noticed a difference in relation to the quality of the decisions made by the specialised competition tribunal, stating that it was not up to her to make this assessment. Nevertheless, she indicated that as they have fewer cases compared to the number of cases that they had to deal with as administrative judges, they make big efforts to better understand the issues, and to strongly justify their decisions.[632]

The rest of the members of the tribunal who were interviewed, three of them, found differences in relation to the quality of the review decisions.

[628] COFECE C, Interview held 14 March 2017, Mexico D. F., answer to question 5
[629] COFECE D, Interview held 14 March 2017, Mexico D. F., answer to question 5
[630] COFECE E, Interview held 23 March 2017, Mexico D. F., answer to question 5
[631] COFECE E, Interview held 23 March 2017, Mexico D. F., answer to question 5
[632] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 5

Member B, for instance, was emphatic when saying that before the adoption of the specialised competition tribunal, there were few decisions solving the substantive issues of the case, due to the lack of knowledge and the workload. This statement was supported by her own experience.[633]

Member C was also categorical in stating that the difference was "*definitive*". She highlighted that the fact that they reviewed all the antitrust cases allowed them to gain a proper specialisation, which would not have been possible otherwise, particularly when they were administrative judges, having one or two antitrust cases per year to be examined rather than the large number of cases that they receive as specialists.[634]

Finally, Member C indicated that for her the change has been "*sensible*", meaning that there has been progress translated into decisions where criteria are adopted, where the substantive issues are solved, and where the decisions are congruent. These features, according to her, have been attained thanks to the experience that they acquire daily as specialists.[635]

Continuing with the analysis, we now present the answers given to the question: "*What do you think has been the most important contribution of the recently adopted specialised competition tribunal in Mexico to the Mexican competition regime?*, in an attempt to explore whether there has been any reference to quality.

[633] Member B, Interview held 10 March 2017, Mexico D. F., answer to question 5
[634] Member C, Interview held 13 March 2017, Mexico D. F., answer to question 5
[635] Member D, Interview held 13 March 2017, Mexico D. F., answer to question 5

With reference to this question, Practitioner B indicated that the specialised competition tribunal through its decisions has helped with the understanding of economic concepts. Practitioner B noted that this development has been beneficial to them.[636]

Practitioner E expressed that the main input offered by the specialised competition tribunal has been a more professional review process, where its members after training and specialisation have demonstrated a better understanding and deeper analysis of the matters under review.[637]

In relation to the members of COFECE, COFECE B indicated that for her the most important input has been the evolution in terms of quality of the review decisions. She noticed a clarification of topics that were obscure, and stressed that the decisions made by this recent specialised competition tribunal offer a deeper analysis of the cases, are more interesting, and are more innovative.[638]

COFECE C expressed that in her opinion, one of the inputs offered by this specialised competition tribunal has been an improvement in the quality of review decisions.[639] Similarly, COFECE D provided this research project with a personal experience according to which, as a member of the competition authority, she noticed how difficult it was to have a homogeneous conversation with judges regarding an antitrust case, due to the judges' lack of knowledge. Equally, she recalled that this

[636] Practitioner B, Interview held 13 March 2017, Mexico D. F., answer to question 3
[637] Practitioner E, Interview held 4 April 2017, Skype, answer to question number 3
[638] COFECE B, Interview held 13 March 2017, Mexico D. F., answer to question 3
[639] COFECE C, Interview held 14 March 2017, Mexico D. F., answer to question 3

lack of knowledge created an significant number of cases solved on procedural failures.[640]

Likewise, COFECE D indicated that it is now possible to have a conversation about competition on an equal footing with members of the specialised competition tribunal. Concepts such as market definition, economic agent, and demand or offer substitutions are now part of their terminology that has been incorporated into wording sentences. COFECE D added that this advance would not have been possible without the adoption of this specialised competition tribunal.[641]

In relation to the members of the specialised competition tribunal, Member A determined that specialisation has allowed for a better rationality of economic matters, as well as a better understanding of legal matters. In this sense, this has been one of the main inputs provided by the specialised competition tribunal.[642]

At the same time, Member C stated that the fact that they are solving only antitrust cases allows them to resolve the substantive issues of the cases and to define concepts which were undefined, and which would otherwise remain unclear.[643] Equally, Member D confirmed that one of the main inputs of this specialised competition tribunal has been a deeper analysis when studying the cases.[644]

Lastly, the answers to the following question could provide more information about how the interviewees perceive the quality of the

[640] COFECE D, Interview held 14 March 2017, Mexico D. F., answer to question 3
[641] COFECE D, Interview held 14 March 2017, Mexico D. F., answer to question 3
[642] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 3
[643] Member C, Interview held 13 March 2017, Mexico D. F., answer to question 3
[644] Member D, Interview held 13 March 2017, Mexico D. F., answer to question 3

decisions made by the specialised competition tribunal. The question was: "*What do you think would be the situation of the competition regime in Mexico if the specialised competition tribunal had not been created? Explain.*"

Practitioner B indicated that if this specialised competition tribunal had not been created, then judges with insufficient knowledge of this complex field, and with poor understanding of the problems that the antitrust cases embody, would continue to review them. For this reason, this practitioner considered that it was worthwhile to adopt this type of judiciary.[645]

Practitioner D expressed that the creation of this specialised competition tribunal has allowed the competition regime to be interpreted with greater technicality, and has avoided the *'aberrant'* review decisions of the past.[646]

Contrary to what was stated by practitioners B and D, Practitioner C claimed that the members of the specialised competition tribunal are not in fact specialists, and as a consequence the quality of their decisions does not differ from those made previously by administrative judges.[647] This affirmation may reflect the fact that when the specialised competition tribunal started functioning its members were not specialists, but received training just after the tribunal was adopted.

Regarding the members of COFECE, one of its members stated that in the absence of the competition tribunal, the situation would be decisions solving just procedural issues and neglecting more substantive matters.

[645] Practitioner B, Interview held 13 March 2017, Mexico D. F., answer to question 4
[646] Practitioner D, Interview held 15 March 2017, Mexico D. F., answer to question 4
[647] Practitioner C, Interview held 23 March 2017, Mexico D. F., answer to question 4

She also perceived progress in terms of the level of the analysis, from analysing only basic concepts such as relevant markets to a more elaborate economic analysis.[648]

Similarly, COFECE F stated that due to the low levels of exposure to antitrust cases, particularly in places outside Mexico City, the level of attention was minimal, and the chances of finding decisions based purely on procedural failures were higher.[649]

COFECE E expressed the same opinion by saying that before the adoption of the specialised competition tribunal it was common to see judges solving antitrust cases for the first time, some of them very complex. This situation had as a result decisions characterised by modest analysis, and a preference for finding procedural failures in an attempt to avoid solving the substantive issues.[650]

In relation to the members of the tribunal, one of them signified that the situation would be the same as before, having decisions that neglected the analysis of the substantive issues of the cases.[651] This position was shared by Member D who asserted that the situation would be characterised by a lack of knowledge of the competition regime, and the technicalities proper of this field. A generalist judge, according to her, due to lack of training and workload, cannot easily obtain this knowledge.[652]

4.2.2.1. CONCLUDING REMARKS

[648] COFECE A, Interview held 10 March 2017, Mexico D. F., answer to question 4
[649] COFECE F, Interview held 10 March 2017, Mexico D. F., answer to question 4
[650] COFECE E, Interview held 23 March 2017, Mexico D. F., answer to question 4
[651] Member C, Interview held 13 March 2017, Mexico D. F., answer to question 4
[652] Member D, Interview held 13 March 2017, Mexico D. F., answer to question 4

To conclude, 85% of the total number of interviewees perceived a difference in terms of the quality of review decisions made by the specialised competition tribunal compared to the review decisions made before its adoption. Their insights are useful because they provide this research project with crucial data such as the finding that the majority of the members of COFECE have perceived an improvement. This is significant, considering the difficulties the authority faced when its decisions were reviewed by judges who were not familiar with the competition regime, with antitrust cases, or with the economic concepts.

It is also important to consider that 85% of the practitioners perceived an improvement. They noticed that the decisions made by the specialised competition tribunal now contain a deeper analysis of the matters, and solve the substantive issues of the cases. This appreciation is important given that one may consider practitioners difficult to satisfy – it would be easier for them to disapprove the decisions made by the judges based on their own expectations.

Equally, the practitioners recognised that in the past there were good decisions, but also a trend whereby a good number of cases were solved based on procedural failures due to a lack of knowledge. This is no longer the case, or perhaps not that prominent.

In relation to the members of the specialised competition tribunal, from their opinions it can be seen that they perceive a significant difference. This statement is relevant considering that in the past they were also responsible for reviewing antitrust cases, but, after training, and encountering antitrust cases every day, their reflection is that this training

and high level of exposure has allowed them to carry out a deeper analysis of the cases.

4.2.3. UNIFORMITY

Section 2.1.1.c identified uniformity as a presumed benefit of specialisation, according to which decisions made by specialised judges will be more consistent. Uniformity, it has been stated, prevents conflicting decisions in cases under similar circumstances, which provides citizens with certainty about the consequences of their acts, and counteracts forum shopping.[653]

This section provides crucial insights about the validity of this alleged benefit from the interviewees' views as to whether the creation of the specialised competition tribunal could have had an impact in relation to the uniformity of the review decisions. The next part analyses the answers to the following question: "*Could the creation of the specialised competition tribunal have had an impact in relation to the uniformity of the review decisions?*"

The majority of the members of the specialised competition tribunal affirmed that after the adoption of this tribunal, the decisions were more uniform. Member A supported her answer by explaining that before the adoption of the specialised tribunal, just in Mexico City, to give an example, 20 collective circuit tribunals on administrative matters, as well as 16 district courts on administrative matters, had jurisdiction to review antitrust cases.

[653] Baum (n 226) 1678; Zimmer (n 216) 2; Savrin (n 214) 118

This example, according to Member A, denotes how difficult it was to expect uniformity from a total of 20 collective circuit tribunals on administrative matters, compared to the 2 collective circuit tribunals in place today as part of the specialised competition tribunal. The same situation was described with regard to the 16 district courts compared to the 2 district courts that now make up the tribunal.[654]

In Member A's opinion, the small number of collective circuit tribunals, and district courts having jurisdiction to review antitrust decisions made by the competition authorities, facilitates uniformity, which is reinforced by the fact that in the case of conflicting decisions, there is a procedure known as a '*contradiction of thesis*'.[655]

This contradiction of thesis is a quick and simple procedure, as Member A explained it, where any member of the specialised competition tribunal may raise a concern about a conflict decision, and all members meet in order to find an agreed position.[656] Section 3.4.3 describes how the specialised competition tribunal is divided into two courts. Court 1 comprises the first Collegiate Circuit Court on administrative matters specialised in Economic Competition, Radiobroadcasting and Telecommunications (second instance), joined by the first district court on administrative matters specialised in Economic Competition, Radiobroadcasting and Telecommunications (first instance). Court 2 comprises the second Collegiate Circuit Court on administrative matters specialised in Economic Competition, Radiobroadcasting and Telecommunications (second instance), joined by the second district

[654] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 5,b
[655] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 5,b
[656] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 5,b

court on administrative matters specialised in Economic Competition, Radiobroadcasting and Telecommunications (first instance).

Member B indicated that to ensure consensus, there have been occasions when the two tribunals have worked together, particularly when solving very complex cases, to find harmony at least on basic topics.[657]

Four out of five members of COFECE said that the adoption of the specialised competition tribunal has had a positive impact in terms of uniformity. COFECE A, C, D, and F agreed the specialised competition tribunal has provided the Mexican competition regime with uniform decisions thanks to the contradiction thesis procedure, and to the small number of judges having jurisdiction to review them.

In contrast to the position expressed by the majority of COFECE members, COFECE E indicated that it is too early to have a position on this, and that as yet she has not noticed any impact in terms of uniformity from the adoption of the specialised competition tribunal.[658]

Two more indirect questions were addressed to the interviewees to try to obtain a consensus about the apparent benefits that specialised tribunals might provide, in this particular case, uniformity. One of the questions was:

– "*What do you think has been the most important contribution of the recently adopted specialised competition tribunal in Mexico to the Mexican competition regime? Explain.*"

[657] Member B, Interview held 10 March 2017, Mexico D. F., answer to question 5,b
[658] COFECE E, Interview held 23 March 2017, Mexico D. F., answer to question 5,b

COFECE A expressed that in her opinion the most important input has been certainty, which contrasts with the situation that was experienced before the adoption of the specialised competition tribunal, when review decisions were inconsistent.[659]

The second question was: "*What do you think would be the situation of the competition regime in Mexico if the specialised competition tribunal had not been created? Explain.*"

Reflecting on this question, Practitioner D noted that the situation would be characterised by a lack of uniformity, adding that the new specialised competition tribunal has endorsed homogeneity when reviewing the decisions made by the competition authorities.[660]

Equally, COFECE B[661] mentioned this lack of uniformity, with homogeneity eroded by forum shopping. COFECE D[662] described how diverse and contradictory the review decisions were before the establishment of the tribunal, and reinforced the situation described by COFECE B. COFECE C[663] indicated that without the adoption of the specialised competition tribunal, forum shopping would subsist as practitioners would have the opportunity to keep choosing the courts of their preference.

4.2.3.1. CONCLUDING REMARKS

[659] COFECE A, Interview held 10 March 2017, Mexico D. F., answer to question 3
[660] Practitioner D, Interview held 15 March 2017, Mexico D. F., answer to question 4
[661] COFECE B, Interview held 13 March 2017, Mexico D. F., answer to question 4
[662] COFECE C, Interview held 14 March 2017, Mexico D. F., answer to question 4
[663] COFECE C, Interview held 14 March 2017, Mexico D. F., answer to question 4

According to the answers given to the questions about uniformity, it seems clear that 87.7% of the interviewees perceived that the adoption of the specialised competition tribunal has been beneficial on this measure. Key factors supporting this perception are the small number of members having jurisdiction to review antitrust cases, and the contradiction thesis procedure, which facilitates the adoption of agreement in case of conflicting decisions.

An important feature that could be underlined is that a good proportion of the members of COFECE, and even one practitioner, stressed that without the adoption of the specialised competition tribunal lack of uniformity would still be affecting the Mexican competition regime. The fact that the new specialised competition tribunal has been centralised, and that a procedure has been contemplated to solve the ambiguities among the members of the tribunal, seems to have alleviated this difficulty.

After reviewing the questions designed to test whether the apparent benefits of specialised competition tribunals are indeed in evidence in the Mexican case, this research project can affirm that the insights of the interviewees seem to endorse the view that this tribunal has been beneficial in terms of efficiency, quality, and uniformity. The next part of this section analyses whether these types of tribunals are particularly at risk of losing their independence, or in other words, to be captured, as some scholars have claimed.

4.3. THE MEXICAN SPECIALISED COMPETITION TRIBUNAL: DRAWBACKS

Section 2.1.2.a indicated that specialised tribunals have been criticised by some authors who consider that having a small group of judges hearing the same types of cases makes it easier for interest groups to identify and approach them in an attempt to force decisions that advantage them. In this regard, one study has been presented which depicts how when industries with highly concentrated markets and strong political influence are involved in a case; the policies implemented by specialised tribunals tend to favour them.[664] Equally, another study has shown how influence during the appointing process of the judges has oriented the decision-making.[665]

This section explores the perceptions of the interviewees in relation to a likely case of capture after the adoption of the specialised competition tribunal in Mexico. Such analysis shows that opinions among the stakeholders are divided, inhibiting conclusive findings. As was the case when analysing the apparent benefits, the interviewees are separated into groups, and concluding remarks are presented at the end.

4.3.1. LOSS OF INDEPENDENCE (OR CAPTURE)

In order to explore this alleged drawback, the following question was addressed to all interviewees: *"What would you say about the possibility that specialised judges may be captured by interested groups?*" The opinions were divided, as the analysis below demonstrates.

The first group to which the question was posed were the members of the specialised competition tribunal. Two out of four members recognised

[664] Unah (n 215) 851–853, 861, 869
[665] Landes and Posner (n 239) 111–112

that it was more likely that specialised tribunals would be captured compared to general tribunals. One member refused to accept this assumption, and the remaining member listed some actions required to prevent this from happening, and explained why with the specialised competition tribunal in Mexico it has not been the case.

This latter one indicated that to prevent the risk some measures had been taken, among them, the live transmission of the sessions of the tribunal using the website of the CJF, the publication of the decisions made by the tribunal, and the publication of the thesis adopted by the tribunal. According to this member, all these measures ensure transparency, and as a result prevent capture.[666]

Member B expressed agreement with this statement. Nevertheless, he also stated that generalist judges face a different and worse type of capture when cases are reviewed by judges who do not have sufficient knowledge, making it easier for practitioners to distract them by presenting inaccurate arguments.[667]

Contrary to what members A and B expressed, Member C rejected the veracity of this claim. In her opinion, the independence and autonomy that the members of the tribunal possess ensure that capture will not be a risk. She added the caveat that short- or long-term tenure should be avoided, because the former does not allow for enough training and the latter may cause judges to embrace strong points of view that are difficult to modify. This last condition, she continued, cannot, however, be categorised as capture.

[666] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 9
[667] Member B, Interview held 10 March 2017, Mexico D. F., answer to question 8

Finally, Member C stated that the regular rotation of the members of the tribunal, together with a good selection process and high levels of transparency, safeguard the impartiality and independence of the review decisions. Particularly in Mexico, she stated, media companies have been involved in the most relevant antitrust cases reviewed by the tribunal, which has provoked a close scrutiny of the decision-making process.

From the analysis of the answers given by the members of COFECE, it was found that four of its members believe that there is no risk of capture, while two consider that there is. Those who think that there is no risk have affirmed that it is easier to invigilate judges when they are few in number, which is the case with the recently adopted specialised competition tribunal, with just six members.[668] COFECE C, who added that the tribunal itself has adopted certain measures to prevent being captured, agreed with this position.[669]

COFECE D illustrated that it is natural to believe that it could be easier to capture a small number of judges who are concentrated in the same place. However, she thinks that this cannot be the rule especially if they have good salaries, and benefits, or if after a period of time they will continue as judges or magistrates in different areas, as is the case for the members of this specialised competition tribunal. She insisted, then, that specialisation does not mean it is easier to be captured.[670]

Similarly, COFECE E indicated that the fact that the tenure of the members of this specialised competition tribunal is short makes their risk

[668] COFECE B, Interview held 13 March 2017, Mexico D. F., answer to question 8
[669] COFECE C, Interview held 14 March 2017, Mexico D. F., answer to question 8
[670] COFECE D, Interview held 14 March 2017, Mexico D. F., answer to question 8

of capture unlikely (Section 3.4.3 indicated that the tenure of the members was established as follows: i) three, a tenure of three years, ii) three, a tenure of two years and six months, and, iii) two, a tenure of two years), adding that if a party intends to approach a judge to try to influence a decision, this will occur irrespective of whether the judge is specialist or generalist. COFECE E indicated that she has not experienced this situation since the adoption of the specialised competition tribunal.[671]

Of the two members of COFECE who agreed with the assumption that there is a higher risk of capture with a specialised tribunal, one signified that her opinion derives from the fact that if the same group of practitioners litigate regularly before the same judges, then familiarity emerges between them. This jeopardy is reduced, however, when the judiciary is a tribunal whose decisions are made by majority.[672]

COFECE F took the same position as COFECE A regarding the higher risk of capture. She grounded her position on the fact that prior to the adoption of the specialised competition tribunal, approximately 74 members of the judiciary had jurisdiction to review antitrust decisions, whereas now this numbers just 6.[673]

COFECE F continued by saying that capture is facilitated when a reduced number of members are responsible for the review process. This is not just because it would be easier for interest groups to approach the members of the judiciary, but also because the members of the specialised tribunal would be less flexible in adopting different points of

[671] COFECE E, Interview held 10 March 2017, Mexico D. F., answer to question 8
[672] COFECE B, Interview held 13 March 2017, Mexico D. F., answer to question 8
[673] COFECE E, Interview held 10 March 2017, Mexico D. F., answer to question 8

view. For this reason, she argues, it would be necessary to rotate them frequently.[674]

In relation to the practitioners, two of them did not consider it more likely that a specialised judge would be captured. For instance, Practitioner A argued that regardless of whether a judge is specialist or generalist, if an interest group wants to approach her, they will do it.[675] Likewise, Practitioner D claimed that the experience in Mexico is that the judges are independent, and that capture is not in evidence. Nonetheless, she mentioned that the specialised tribunal has been deferential towards the competition authorities and that this, in her opinion, should be quickly remedied.[676]

Conversely, three practitioners considered that the likelihood of capture is higher. Practitioner B in particular expressed that capture is one of her biggest concerns.[677] At the same time Practitioner C indicated that considering that specialised competition tribunals have a small and identifiable number of members, and that usually it is the big industries involved in antitrust cases, the chances that capture will take place are greater. However, she clarified that she has not witnessed any case of capture so far.[678]

Finally, Practitioner E recognised that the adoption of specialised tribunals implies a risk of capture, which can be diminished if the judges are rotated gradually, and if the jurisdiction scope is wider.

[674] COFECE E, Interview held 10 March 2017, Mexico D. F., answer to question 8
[675] Practitioner A, Interview held 13 March 2017, Mexico D. F., answer to question 8
[676] Practitioner D, Interview held 15 March 2017, Mexico D. F., answer to question 8
[677] Practitioner B, Interview held 13 March 2017, Mexico D. F., answer to question 8
[678] Practitioner C, Interview held 23 March 2017, Mexico D. F., answer to question 8

4.3.1.1. CONCLUDING REMARKS

It has been observed that the opinions given by the different groups of interviewees regarding the greater possibility that specialised tribunals could be captured by interest groups are divided. For instance, 50% of the members of the competition tribunal, 33.3% of the members of COFECE, and 60% of the practitioners agree that the risk is higher. An important feature is that two members of the specialised competition tribunal recognised capture as a threat, and one of them was emphatic in saying that transparency measures are required to lessen the threat.

In relation to the members of COFECE and the practitioners who agreed with the proposition, they backed up their statements by referring to the proximity that arises when a small number of judges are frequently in contact with more or less the same practitioners. They also spoke about how judges can become inflexible about new or different points of view, and that capture can occur simply because it is easier to identify and approach a small number of judges rather than a larger group. The common measure that was proposed by the interviewees to alleviate this jeopardy was the rotation of the members of the specialised tribunals.

By contrast, one member of the competition tribunal was reluctant to accept this postulate, given the levels of independence and autonomy that the specialised competition tribunal enjoys. One member of COFECE stated that it is easier to invigilate a small number of judges, which makes capture less likely. Similarly, another member of COFECE noted that the good salaries enjoyed by the members of the competition tribunal, accompanied by their short tenure, reduce the risk of capture. Finally, one

practitioner indicated that irrespective of whether a judge is generalist or specialist, if an interest group intends to approach her they will do so.

So, it is clear that by having fewer judges responsible for reviewing certain types of cases it is easier for interest groups to identify them, and probably to approach them, but at the same time also easier to supervise the performance of the judges. In any case, transparency measures should be adopted to prevent captures from happening, and attractive salaries and benefits need to be in place to ensure that the chances of capture remain minor. Ultimately, long-term tenure should be avoided.

Reflecting on the interviewees' views with regard to the alleged benefits and drawbacks that some scholars have attributed to specialised tribunals, and taking the specialised competition tribunal in Mexico as a gauge, this research project has identified a lack of competition knowledge and low levels of exposure to antitrust cases as the common themes behind why in this case specialists outperform generalists. The main finding is that these severe hurdles led to the widespread practice of finding procedural failures to solve review processes, and greatly impeded a better implementation of competition law in Mexico. The next part explores if according to the interviewees the adoption of specialised competition tribunals in Latin American countries is advisable.

4.4. SPECIALISED COMPETITION TRIBUNALS IN LATIN AMERICAN COUNTRIES: ADVISABLE?

The first significant finding of this section is that all the stakeholders solidly recommend the adoption of specialised competition tribunals by Latin American countries that do not currently have them. Their

recommendations derive from the scale of the deficiencies shown by the judiciary in Mexico, and the improvement that the specialised competition tribunal has brought in terms of efficiency, quality, and uniformity.

The second finding is that the claims made by some scholars who do not support the adoption of this type of judiciary since they consider that simply a sense of fairness is needed to solve any case,[679] that not all the antitrust cases are based on economic issues,[680] and that the practitioners should present the cases in a sufficiently clear manner that any judge should be able to understand them,[681] were not endorsed by the members of the specialised competition tribunal in Mexico. There follows a more detailed evaluation of the opinions given by the stakeholders.

All members of the specialised competition tribunal recommended the adoption of specialised competition tribunals in Latin American countries that do not currently have them. Member A signified that it is not advisable to make generalist judges responsible for reviewing antitrust cases that day by day are becoming more difficult to understand, with the aggravation that inaccurate decisions might negatively impact the economy of a country.[682]

Member B stated that it is time to cease solving antitrust cases based on procedural failures, and to start creating rational decisions, particularly when the law does not provide the solution. In the end, she insisted, it is

[679] Wood (n 11) 6–7
[680] OECD (n 19) 70
[681] Rakoff (n 12) 7–9
[682] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 7

necessary to count on highly prepared judges.[683] Equally, Member C strongly advised the adoption of specialised competition tribunals in Latin America.

Finally, Member D admitted that she was not convinced that specialisation was necessary, but after performing as a specialist member of the competition tribunal, she has realised that specialisation is convenient, considering that specific and constant training is required to be able to solve antitrust cases accurately.

The majority of the members of COFECE estimated that the adoption of specialised competition tribunals would be advisable for Latin American countries. For instance, COFECE A indicated that if some other Latin American countries are experiencing what Mexico did, in terms of having judges reviewing antitrust cases once in their lives, then specialisation could be a sensible solution. If this option is not viable, then this member of the Commission considers that the adoption of a system where generalist judges regularly review antitrust cases is fundamental.[684]

COFECE B estimated that after the positive experience of Mexico following adoption of a specialised competition tribunal, some other Latin American countries should consider this option, particularly in cases similar to Mexico where the number of judges having jurisdiction to review antitrust cases decreased from 300 or 400 to just six, with the result that there is less time spent discussing formal issues.[685]

[683] Member B, Interview held 10 March 2017, Mexico D. F., answer to question 7
[684] COFECE A, Interview held 10 March 2017, Mexico D. F., answer to question 7
[685] COFECE B, Interview held 13 March 2017, Mexico D. F., answer to question 7

COFECE C indicated that the replication of the Mexico case by some other jurisdictions in Latin America might be a useful instrument to improve the service of justice.[686] COFECE D suggested that the adoption of these types of tribunals in some other Latin American countries would be a suitable option if the scope were wide enough to make the decision justifiable. This has been the case in Mexico where the specialised competition tribunal is responsible for competition, telecommunications, and broadcasting.[687]

COFECE E based her recommendation on the complexity that the competition field possesses, making of specialisation the most favourable option.[688] Finally, COFECE F strongly recommended the adoption of this type of judiciary, considering that some other Latin American countries are similar to Mexico in terms of traditions, ideology, legal system, but also in terms of backlashes such as a lack of competition culture or corruption. For all these reasons, she considers that the adoption of specialised competition tribunals will bring these competition regimes closer to international standards.[689] In terms of the practitioners, all those interviewed would also recommend the adoption of this type of judiciary for some other Latin American countries.

Having seen the extent to which the adoption of this type of judiciary has been recommended, this research project explores whether the allegations stated by some scholars who do not support the adoption of this type of judiciary, such as the need for only a sense of fairness for a judge to be

[686] COFECE C, Interview held 14 March 2017, Mexico D. F., answer to question 7
[687] COFECE D, Interview held 14 March 2017, Mexico D. F., answer to question 7
[688] COFECE E, Interview held 10 March 2017, Mexico D. F., answer to question 7
[689] COFECE F, Interview held 10 March 2017, Mexico D. F., answer to question 7

able to solve any case,[690] the claim that not all antitrust cases are based on economic issues,[691] and that the lawyers should present the cases in sufficiently clear a manner that any judge should be able to understand them,[692] are valid.

In this regard, Member A was emphatic in saying that to expect that a judge can learn about a specific field of law by just reading the law, or to expect that a judge knows about a specific field of law simply because she is a judge, was in her opinion a '*fiction*', insisting that is necessary to learn about the reality behind the regulations, something that only specialisation makes attainable.[693]

Member D shared the same position presented by Member A in the sense that she felt it is not enough for a judge to read the law for her to be able to understand the reasoning of the competition authorities. She added that it is complicated for a judge to become a specialist in a particular matter if at the same time the scope of jurisdiction includes some other areas of law, even if some training is provided.[694]

Member B illuminated this research by indicating that a generalist judge needs a proper and constant training to be able to understand the problems that antitrust cases display. This member supported his claim by arguing that this field is not the domain of many, so if the judge does not have sufficient training it is likely that misleading arguments may appear convincing.[695]

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[690] Wood (n 11) 7
[691] OECD (n 19) 70
[692] Rakoff (n 12) 7–9
[693] Member A, Interview held 10 March 2017, Mexico D. F., answer to question 6
[694] Member D, Interview held 13 March 2017, Mexico D. F., answer to question 6.b
[695] Member B, Interview held 10 March 2017, Mexico D. F., answer to question 6

In the opinion of Member C, every judge is intellectually capable of solving cases, but specialisation provides important tools to produce quicker and deeper decisions, particularly given that a good number of judges in Mexico did not receive competition law as part of their law programmes at university, so this lack of knowledge could undermine any efforts to try to solve such a sophisticated matter.[696]

Interpreting what the specialised members of the specialised competition tribunal in Mexico have indicated about how qualified a generalist judge in Mexico is to solve an antitrust case, it appears that, based on their own experiences, specialisation is desirable. In conclusion, the claim presented by some scholars that the creation of specialised competition tribunals is not necessary, loses influence in countries where the levels of competition knowledge, levels of exposure to antitrust cases, and levels of a culture of competition are low.

4.4.1. CONCLUDING REMARKS

It is clear that the interviewees unanimously recommend the adoption of specialised competition tribunals for some other Latin American countries, based on the Mexican experience. Beginning with the comments given by the members of the specialised competition tribunal, they recognised that specialisation has provided them with better tools to review antitrust cases, and that as specialists, they feel more assured and better prepared to analyse the complexity that competition law involves than they were when acting as generalists.

[696] Member C, Interview held 13 March 2017, Mexico D. F., answer to question 6, 6a

Continuing with the opinions given by the members of COFECE and the practitioners, it is clear that this type of judiciary has diminished the large number of review decisions based purely on issues of form and has introduced a review process where the analysis of the cases goes deeper, combined with a more standard definition of new or ambiguous concepts.

Some scholars estimate that specialised competition tribunals are not indispensable for the following reasons – 1) judges are prepared to solve any case based on fairness; 2) not all the debates around antitrust cases rely on economics; and, 3) the facts of the cases should be presented in sufficiently clear a manner by the practitioners that it is easy for a judge to understand them. However, these seem inapplicable at least in countries like Mexico. The fact that competition knowledge was scarce amid the judiciary, that law programmes do not offer exhaustive competition law training, that levels of a culture of competition are low, and that generalist judges have insufficient levels of exposure to antitrust cases, render such arguments unconvincing.

A judge will find it more difficult to understand an antitrust case if they have not received a fundamental training in economics or competition law either during their time at university or during their time as a judge. Such a judge may produce an accurate decision, but it is also more likely that the analysis process will take longer, be shallow, and that procedural failures will be used as a way to avoid deeper analysis of the case.

This scenario was experienced in Mexico before the adoption of the specialised competition tribunal, and after its adoption an improvement has been perceived by 100% of the members of COFECE and 85% of the practitioners interviewed. The improvement has been so significant that

the majority of the interviewees would recommend the adoption of this type of judiciary to some other Latin American countries experiencing the same issues faced by Mexico before.

4.5. CONCLUSIONS

The aim of this chapter has been to analyse the data collected during the fieldwork which took place in Mexico in March 2017, consisting of interviews where similar questions were addressed to the members of the specialised competition tribunal in Mexico, the members of the Mexican competition authority (COFECE), and to some practitioners.

The questions were designed in a way that the perceptions of the interviewees can provide vital insights about how beneficial the specialised competition tribunal in Mexico has been in terms of quality, quantity, and uniformity. Also, one question was formulated to explore whether the stakeholders share the views of those how believe that this type of judiciary brings higher risk of capture.

One more aspect that was investigated was whether the interviewees would recommend the adoption of a specialised competition tribunal to some other Latin American countries. Finally, in the context of the opinions given by the stakeholders, the arguments presented by some scholars who do not support the necessity of adopting specialised tribunals were queried.

In terms of the supposed benefits that specialised competition tribunals may deliver, such as efficiency, quality, and uniformity, the first step taken by this research project was to examine the perceptions of the

interviewees regarding the complexity of competition law, and to what extent economics is involved when solving antitrust cases. If these two postulates were accepted as true, then specialisation would be advisable, as it would have a positive impact in terms of efficiency and quality.

From the analysis of the answers given by the stakeholders, it is clear that all of them regard competition law to be a complex field, and that they agree that the use of economics is inherent. These two postulates have therefore been accepted. Based on this finding, the next step was to investigate whether the adoption of the specialised competition tribunal in Mexico has had any impact in terms of efficiency, quality, and uniformity.

The evaluation of the perceptions of the members of the specialised competition tribunal, the members of the Mexican competition authority (COFECE), and the practitioners provide this research project with the insights that the levels of efficiency have improved after adopting the specialised competition tribunal. In terms of quality, the result is that an improvement has been observed, thanks to fewer review decisions based on procedural failures, and decisions based on more in-depth analysis.

In relation to uniformity, the agreement has been unanimous. All the interviewees consider that after the adoption of the specialised competition tribunal, the decisions are more uniform and less contradictory.

The interviewees were also asked whether capture, one of the drawbacks that have been ascribed to specialised tribunals, has been in evidence in Mexico after the adoption of the specialised competition tribunal. The

results from this analysis were unsettling, as the perceptions from the interviewees about this particular aspect were divided. On the one hand, a group of participants considered that specialised tribunals favour capture as it is easier to identify the members of such tribunals and to try to persuade them to your cause. On the other, some participants considered that capture is less likely when adopting specialised tribunals as it is easy to monitor the members. Regardless of the divided opinions, the majority of the participants indicated that in any case it is important to adopt transparency measures, to avoid long-term tenures, and to ensure good salaries and benefits to the members of these tribunals.

The assessment of the performance of the specialised competition tribunal has also informed this research project with the identification of the two main deficiencies faced by generalist judges reviewing antitrust cases: i) lack of competition knowledge; and ii) low levels of exposure to antitrust cases. The research project has also identified the origin of these two main deficiencies as the insufficiency of law programmes, aggravated by a lack of training and a heavy workload. Together these insufficiencies represent to what extent the judiciary in Mexico interfered with the enforcement activities, explain why the adoption of a specialised tribunal was necessary, and highlight why it was unrealistic to expect that generalist judges could outperform specialist.

Finally, based on the experience collected in Mexico and after analysing the opinions regarding the alleged benefits and drawbacks appointed to specialised tribunals, this research project has established that the participants collectively recommend the adoption of specialised competition tribunals to some other Latin American countries that do not

currently have them. The next chapter studies the implications of this analysis.

CHAPTER 5

The benefits of specialised competition tribunals: Lessons from Mexico

INTRODUCTION

The main purpose of this research project is to establish whether specialised competition tribunals are advisable for Latin American countries, using Mexico as a case study. The previous chapters of this thesis have been structured in such a way as to help achieve this purpose. The introduction to this thesis presented the methodology used to collect, analyse and organise the data, while Chapter 1 provided a conceptual framework about institutions, transplants, institutional change, culture, and designs of transplants in order to explain the institutional transplant phenomenon as well as to appraise how to make it workable.

Chapter 1 also established the commonalities present among Latin American countries – young agencies, under-developed competition regimes, low levels of competition culture derived from income levels, poverty levels, barriers to entry, barriers to import, and informal economy – in an attempt to appreciate why the outcomes of the Mexican case might be applicable to them. It also determined that the judiciaries in the majority of Latin American countries are perceived as untrustworthy, a situation that has implications for enforcement activities, given the interplay between competition agencies and the courts.

After setting the theoretical framework and context, Chapter 2 then introduced the debates around the benefits and drawbacks of specialised tribunals, and then discussed these in more detail, this time specifically

regarding specialised tribunals in the field of competition law, and including debates about specialised competition tribunals in developing countries. Finally, the chapter explored how actively international organisations have been persuading developing countries to adopt this type of judiciary.

Chapter 3 looked at the history of the development of Mexican markets, including how the judiciary is integrated, how judges are selected, and the main obstacles that this branch faces. Lastly, there was an evaluation of the development of the Mexican competition regimes, the Mexican competition authorities, the development of the review process of antitrust cases, and the reasons why a specialised competition tribunal was adopted in Mexico. Such comprehensive analysis was essential to appraise the significance of adopting the specialised competition tribunal.

Subsequently, Chapter 4 evaluated the data that was collected during the fieldwork in Mexico, where the interviewees were divided into three groups (competition authority members, specialised competition tribunal members and practitioners). Such an approach sought to separately evaluate the answers to the similar questions formulated to all interviewees regarding how beneficial the specialised competition tribunal in Mexico has been in terms of efficiency, quality, and uniformity, as well as whether the body in question has been affected by loss of independence (capture).

The purpose of this chapter is to present the results of this research project by referring back to the arguments, doctrine, and collected data, and then providing some recommendations based on the empirical evidence collected from the case study in Mexico. Therefore, this chapter

is structured as follows: Section 5.1 will offer narrow and broader findings; Section 5.2 will describe the limitations of the findings; and Section 5.3 will provide some recommendations to improve policy application of future work, and future research.

5.1. FINDINGS

As Chapter 2 has illustrated, the creation of specialised tribunals has become an important phenomenon mainly seen as a way to alleviate the common issues that the judiciary confronts, such as delays, unreliability, and lack of independence, among others. Nonetheless, Lawrence Baum has expressed concerns about the scarcity of empirical evidence to prove the veracity of the virtues generally assigned to this type of judiciary, adding that systematic comparable studies when some form of jurisdiction is transferred from a generalist to a specialised body are insufficient and at the same time required.[697] Baum has also claimed that due to the lack of empirical evidence '*specialisation is a product of inadvertence rather than design*'.[698]

This research project has been devised to try to remedy this weakness by studying the recent adoption of the specialised competition tribunal in Mexico, where jurisdiction was transferred from a generalist to a specialised tribunal. The approach devised for this purpose was to assess the performance of the latter based on the perceptions of key stakeholders in terms of efficiency, quality, and uniformity, and also to establish whether specialised tribunals are more likely to be captured, this being one of the most common drawbacks assigned to this type of judiciary.

[697] Baum (n 7) 213–218
[698] Ibid. 5

Similarly, and with a view to shedding light on whether specialisation is to be recommended, Legomsky proposed a number of indicators, complexity being one of them. This research project undertook a literature review which sought to establish whether competition law was indeed complex and identified two main streams within the relevant literature. On the one hand, the literature suggests that competition law is a highly complex matter and that economics nourishes competition law such that it would be unrealistic to expect a generalist judge to come to a correct decision in antitrust cases based purely on precedents, untrained intuition or through interpretation of the law. On the other hand, opposing arguments do not support the need for specialised competition tribunals since not all antitrust cases involve economic issues, judges merely need a good sense of fairness to solve any case, and practitioners are obliged to present the facts in a sufficiently simple way that it is easy for judges to understand them all.

The next part of this section presents the findings of this research project, which will be divided into narrow and broad findings. The narrow findings refer specifically to the Mexican case. In brief, the impact of the *amparo* action on the outcomes of the specialised competition tribunal, the lack of competition knowledge amid the judiciary, the low levels of exposure to antitrust cases experienced by generalist judges, and the market characteristics.

The broader findings refer to the conclusions drawn from the Mexican case and potentially applicable to Latin American countries that are affected by obstacles in the implementation of competition law and that are searching for remedies. The analysis starts with Baum's and

Legomsky's claims, continues with the question as to whether specialised tribunals are preferable to generalist ones in competition law, examines the role played by international organisations in persuading countries to adopt this type of judiciary, and ends by examining whether specialised competition tribunals are advisable for Latin American countries. Section 5.1.1 describes the narrow findings from the Mexican example.

5.1.1. NARROW FINDINGS: MEXICO

A comprehensive assessment of the findings of this research project requires an awareness of the four aspects that made justifiable the adoption of the specialised competition tribunal in Mexico, which at the same time may explain why the majority of the participants regard the performance of this specialised tribunal as beneficial in terms of efficiency, quality, and uniformity. These four aspects are: a) the *amparo* action; b) lack of competition knowledge; c) low levels of exposure; and d) market characteristics. A brief analysis of each one is presented next.

a. The *amparo* action

The fact that *amparo* actions were invoked to challenge and suspend a significant number of the decisions made by the competition authority resulted in three negative consequences. First, a negative impact on the length of the procedures; second, the incorrect annulment of decisions by judges without a good knowledge of competition law, resulting in reviews excessively based on formal issues, and, third, incongruous decisions resulting from the significant number of judges across the country with jurisdiction to solve the cases. These three shortcomings underpinned the adoption of the specialised competition tribunal.

Hence, the overuse of *amparo* actions signified a limited enforcement experience given the length of the cases provoked by the endless number of challenges against intra-procedural and final decisions. As a result, the adoption of the specialised competition tribunal in Mexico was accompanied by the introduction of an important reform consisting of the possibility to challenge only final decisions through indirect *amparo*, thereby limiting its power.

In terms of efficiency, it could be suggested here that without the introduction of such a reform, the specialised competition tribunal would have had to face an unlimited number of *amparo* actions against every single decision made by the competition authorities, as was indeed the case before the introduction of the reform. In such a case, the question would be whether the performance of the tribunal could be the same in terms of efficiency.

It could be also proposed that once the large number of *amparo* actions was halted due to the legal reform, and with the reform coming into being in parallel with the adoption of the new specialised competition tribunal, then instinctively the perceptions of the participants would be that efficiency had been greatly improved by the adoption of the tribunal. Otherwise, it could be conjectured that the reason for having a more efficient review process rested on the intra-procedural decisions being no longer challengeable.

Given the nature of the collected data, it is not possible to determine what the performance of the specialised competition tribunal would have been like in terms of efficiency in the absence of the legal reform, neither can

we anticipate whether such efficiency would have been obtained solely with the introduction of the reform. What remains undisputable is that the reform of the admissibility of *amparo* actions against intra-procedural decisions was indispensable to enable the new specialised competition tribunal to perform under normal conditions.

In other words, without the reform and with the specialised competition tribunal only, efficiency would have been hindered. Then, having transited from a very inefficient review system to a new one where the time required to review a case fell from 18 months to 6 months, according to the information provided by one member of COFECE, it is not surprising that participants regard the performance of this new specialised tribunal as more efficient.

In relation to the quality of review decisions, the excessive use of *amparo* actions against all the decisions made by the competition authority had a negative impact for two main reasons. First, the endless number of *amparo* actions against almost every decision made by the competition authority generated huge delays, with it often taking years for a case to reach final decision review stage. This meant the chances of creating jurisprudence and developing the competition regime were small. Second, the preference for solving the unlimited number of *amparo* actions against the decisions made by the competition authority based on procedural failures, as a way to cope with the workload, meant the analysis of substantive issues were left to one side. This problem was so evident that the Mexican parliament adopted a specialised competition tribunal, and reformed the admissibility of *amparo* action against intra-procedural decisions made by the competition authorities.

Overall, the interviewees perceived an improvement in terms of the quality of review decisions made by the specialised competition tribunal compared to the review decisions made before its adoption. The members of COFECE revealed that the issue whereby the decisions of the agency were reviewed by judges who were not familiar with antitrust or economic concepts has now been resolved. The practitioners have also noticed that the judicial review is now an in-depth one, and that decisions made on mere formal failures are no longer in evidence, or at least not that prominent. At the same time, the members of the specialised competition tribunal estimate that continuous training and high levels of exposure have allowed them to carry out a deeper analysis of the cases.

The incidence of the *amparo* action in the quality of the review decisions was so embedded as to justify the decision of adopting a specialised competition tribunal in Mexico, as it seemed unlikely that by just providing training in competition law to generalist judges the quality issue would have been remedied effectively.

Finally, in relation to uniformity it is clear that the *amparo* action against all decisions made by the competition authority created an unprecedented number of ambiguous decisions, where numerous judges across the country had jurisdiction to review them. In this regard, the legal reform designed to admit this legal action against final decisions only was the right move, because the reform came into effect alongside the adoption of a body where all review decision processes are now concentrated. This has reinforced the positive outcomes, as illustrated by all the participants.

This research project has offered suggestive evidence that the *amparo* action was a very important factor in determining the necessity of a

specialised competition tribunal. In its absence this necessity might have been less strong; the perceptions in terms of improvements in the quality of decision-making might have changed; and most likely other options to remedy the issue like training would have been as effective.

b. Lack of competition knowledge

Another fundamental factor in determining the necessity of adopting a specialised competition tribunal in Mexico is the lack of competition knowledge among the judiciary. Chapter 3 described the core of this issue as being the poor quality of law programmes in some universities in Mexico, where more and more new universities are offering law programmes but without proper scrutiny from the respective authorities with regard to their sufficiency, and where the requirements to become a practitioner are modest, with no previous practice needed.

In Chapter 4 participants referred on several occasions to the lack of competition knowledge as an issue that has impeded the development of the Mexican competition regime, and negatively affected the quality of the judicial decisions made in antitrust cases. In particular, some members of the specialised competition authority illustrated that they did not receive competition law training when they were law students, nor when they were generalist judges.

Similarly, some members of COFECE said that they attended schools of law where competition law or economics were not included as part of the law programmes, and they highlighted the lack of competition knowledge among some members of the judiciary, which was a times aggravated by judges from remote parts of the country reviewing decisions made by the

competition authority. The practitioners expressed the same concern, stating that on some occasions the lack of knowledge generated '*aberrant*' decisions.

This profound lack of competition knowledge explains why the perceptions about the improvement of the quality of the review decisions are so strong, and why the members of the specialised competition tribunal affirm that they feel better equipped to analyse the cases more comprehensively after receiving training and dealing with antitrust cases daily. It is questionable whether other options, such as training generalist judges, would have offered the same results.

c. Low levels of exposure

The members of COFECE repeatedly indicated that levels of exposure to antitrust cases were so low that judges would review just one antitrust case in their entire career, or one or two in busy cities like Mexico City. These low levels of exposure to antitrust cases were a major factor in the lack of competition knowledge among judges, because there was no imperative to learn about it.

Some members of the specialised competition tribunal stated that reviewing one or two antitrust cases per year was not enough to obtain the knowledge and experience that this field requires, thereby confirming the negative impact of low levels of exposure. These members added that the specialisation that comes from reviewing antitrust cases daily has provided them with better tools to make quicker and better decisions.

It could be suggested that the perceptions about the improvement of the review process of antitrust cases in terms of efficiency, quality, and uniformity in the Mexican case were noticeable due to the radical transition experienced by the members of the judiciary – from no training and insufficient exposure to more training and high levels of exposure. As a result, it seems clear that specialisation is advisable when a lack of knowledge and low levels of exposure are patent, though it remains unclear whether under such conditions just training would have been as effective as specialisation.

d. Market characteristics

The functioning of the Mexican markets, as explored in Chapter 3, has been influenced by specific circumstances. First, the geographic closeness with America has represented a threat, which at times has been met by Mexico strengthening trade with its larger neighbour, at others by closing the markets. Second, the predominance of the PRI for more than six decades has signified an unprecedented concentration of political power translated into the implementation of economic policies primarily seeking to preserve this power.

Third, this unprecedented concentration of power has also been observed in the active role that the government has played in the Mexican economy, represented by measures such as price controls, subsidies to local business, import tariffs, nationalisation of enterprises, privatisation of enterprises, stimulation and protection of monopolies, and regulation or deregulation of markets.

Fourth, the economic crises that Mexico has experienced have been met with the adoption and implementation of different economic policies intended to remedy only the immediate effects, thereby making them inconsistent and short term. The combination of all these factors depicts a market that is complex, uncompetitive, aligned with the interests of political actors, perhaps distant from the needs of the economy, and with policies that vary erratically due to a lack of proper design.

The presence of such issues made it difficult to envisage the adoption of a specialised competition tribunal, which at the time was seen as an unprecedented reform. Indeed, it could be that the opinions given by the interviewees regarding the performance of this new authority were a reflection of their awareness of the particular characteristics of the Mexican markets, which display a compelling need for supervision by specialist judges rather than merely trained generalists.

5.1.1.2. CONCLUDING REMARKS

After studying the adoption of the specialised competition tribunal in Mexico, where the assumed benefits of efficiency, quality, and uniformity have been confirmed, the findings of this research project appear to support the argument for the advisability of adopting specialised competition tribunals in other Latin American countries.

However, these findings cannot be seen separately from the specific circumstances of Mexico that have made of this a positive case. The suggestion here is that under these circumstances, the adoption of a specialised competition tribunal constituted a necessary institutional change, and a profoundly beneficial one.

The first specific circumstance was the overuse of the *amparo*, which for decades impeded the normal implementation of the competition regime. The second was the deep lack of competition knowledge originating in the insufficient law programmes and aggravated by the lack of training among the members of the judiciary. The third was the low levels of exposure to antitrust cases, which meant that training in the field was not deemed necessary.

The fourth specific circumstance was to do with the particular characteristics of the Mexican markets: highly concentrated; moving from extremely open to extremely closed or vice versa; with governments stimulating the creation and existence of monopolies; and with erratic short-term economic policies usually designed to alleviate immediate issues.

The combination of these circumstances, which negatively impacted the development of the competition regime in Mexico, makes the adoption of a specialised competition tribunal advisable, and may also explain why a good percentage of the interviewees recommended the adoption of this type of judiciary for some other Latin American countries, as for them, the benefits in terms of efficiency, quality, and uniformity have been much in evidence.

It should be stressed that without these prevailing circumstances, the adoption of the specialised competition tribunal in Mexico may not have been the most advisable option, and the implementation of different measures may have been more suitable. The experience provided by the

Mexican case will be used to present broader conclusions for Latin American countries as a whole.

5.1.2. BROADER FINDINGS

a. Empirical evidence

Lawrence Baum has expressed his concern over the scarcity of empirical evidence to prove the veracity of the virtues generally assigned to these types of judiciary; and the insufficiency of systematic comparable studies when some form of jurisdiction is transferred from a generalist to a specialised body. For this reason, this thesis, using the adoption of the specialised competition tribunal in Mexico as a case study, where jurisdiction from generalists was relocated to specialists, has advanced the argument by offering crucial insights, from the perceptions of key stakeholders, into how beneficial this specialised tribunal has been in terms of efficiency, quality, and uniformity. In relation to loss of independence, conclusive findings are not presented.

- *Efficiency*

The finding here is that 83.3% of the members of COFECE and the interviewed practitioners perceive the specialised competition tribunal in Mexico to be more efficient in reviewing antitrust cases than the previous generalist tribunal responsible for such a task (Section 4.2.1.1).

- *Quality*

The finding here is that 85% of the interviewees consider that the quality of the review process has improved following the adoption of the specialised competition tribunal (Section 4.2.2.1).

- *Uniformity*

The finding here is that 87.7% of the interviewees perceived uniformity to be one of the most important contributions of the specialised competition tribunal in Mexico (Section 4.2.3.1).

- *Loss of independence (capture)*

This research project was unable to provide definite findings regarding the likelihood of loss of independence or capture following the adoption of specialised tribunals (one of the most common drawbacks assigned to this type of judiciary), as the opinions among the participants were profoundly divided.

For instance, some participants considered that when there is a small group of judges reviewing the same types of cases the risk of capture is higher, while others claimed the opposite as it is easier to monitor these small groups than when there is a large and diffuse number of judges across the country. One practitioner indicated that the risk is the same whether the judge is generalist or specialist because if an interest group intends to approach a judge, it will do so.

Those who estimated the likelihood of capture to be higher when the jurisdiction is given to a specialised tribunal referred to '*deference*' towards the decisions made by the competition authorities as an

illustration of how the specialised competition authority in Mexico has been captured.

Regardless of whether they felt the likelihood of capture to be greater with the adoption of specialised competition tribunals or not, the participants all recommended the following: 1) reasonable tenure periods; 2) rotation of the members of the tribunals; 3) good salaries and benefits for the members of the judiciary; 4) public debates; and, 5) public decisions.

b. Specialisation: a product of inadvertence rather than design

With regard to the increasingly common phenomenon of specialisation of tribunals, whose adoption happens generally without an accurate analysis of the real benefits of this type of judiciary, Lawrence Baum has asserted that '*specialisation is a product of inadvertence rather than design*'.[699] The findings of this research project appear to support such an argument.

In the Mexican case, there was no evidence that studies regarding the benefits of specialised competition tribunals were either provided or examined during the debates inside parliament. Reference was not made to cases in other countries or in other fields where the adoption of specialised tribunals had turned out to be successful, so no similar outcomes could be derived.

The emphasis during the parliamentary debates was on the importance of the telecommunications sector, as the initiative to adopt a specialised tribunal was part of a telecommunications law project. Likewise, the law

[699] Baum (n 7) 5

initiative presented to the parliament mentioned that the adoption of a specialised competition tribunal would alleviate efficiency, quality, and uniformity issues, but no empirical evidence was provided to support this (Section 3.4.2).

This situation reveals that the decision to adopt a specialised competition tribunal did not enjoy careful scrutiny – there was no analysis about why or how this type of judiciary would achieve the desired results; no examination of different alternatives which could have brought the same results; and no explanation of why the adoption of this type of judiciary was the only or best solution to mitigate the inflicted issues.

To conclude, even if the adoption of the specialised competition tribunal in Mexico has proven to be beneficial, it is clear that this finding is broadly in line with what Baum has asserted, that the adoption of this specialised competition tribunal has been another product of inadvertence rather than design. In this sense, if some other Latin American countries intend to adopt a similar institutional reform, they should devote enough time to an in-depth analysis.

c. Specialisation: Legomsky's indicators

The tentative conclusions of this study seem to suggest that the indicators proposed by Legomsky (Section 2.2) are met in the field of competition law, making specialisation suitable in such a case. Particularly in relation to the complexity indicator, which still remains debatable among scholars, this research project has progressed the argument by showing that the members of the specialised competition tribunal, the members of the competition authority, and the practitioners in Mexico consider this

field to be complex, an aspect that influences the interpretation of the next finding.

d. Competition law: generalists vs specialists

The outcomes of this research project appear to endorse the argument of Judge Posner regarding the assumption that it is unrealistic to expect the average judge to fully understand the complexity that an antitrust case offers, given the involvement of economics.[700] This argument has been expanded on by Baye and Wright who have claimed that it is very unlikely that a judge without an economic training could come to a right decision in antitrust cases based purely on precedents, untrained intuition or by interpreting the law.[701]

The Mexican case has offered crucial insights from the judges who had the opportunity to review antitrust cases as generalists and now do so as specialists. These judges have noted that in their three years working as specialists in competition law, where training and levels of exposure have increased significantly, they have acquired the proper tools to review antitrust cases more quickly and with a more in-depth analysis. This situation was unlikely to happen when they were generalists mainly because of workload. As training was not provided, they did not have the spare time to self-teach, or a high-enough number of antitrust cases from which to learn.

Regarding Baye and Wright's argument about it being unrealistic to expect an average judge to produce a good review decision in an antitrust case simply by using precedents or interpreting the law, two members of

[700] Posner (n 235) 91–99
[701] Baye and Wright (n 9) 4

the specialised competition authority confirmed that this would indeed be illusory. Similarly, two members of the tribunal explained that antitrust cases are so complex that training and a good understanding of economics are essential.

The interviewees repeatedly indicated that the lack of competition knowledge prompted a marked preference for solving the review of antitrust cases based on procedural failures, as a way to avoid the analysis of substantive issues. They observed that on the rare occasions when generalist judges intended to solve the substantive issues, the results could be unfortunate.

It is clear, then, that the claims made by Posner, Baye and Wright are well-reflected in the Mexican case, where it was unlikely that generalists judges would have performed as specialists do, considering that for decades the judiciary was afflicted by a deep lack of competition knowledge, scarcity of training in competition law or economics, and very low levels of exposure to antitrust cases.

Perhaps the claims gain more weight in the Mexican case if factors such as very low levels of competition culture, highly concentrated markets, governments preventing competition and encouraging monopolies, low levels of enforcement, ineffective competition regimes, and, for decades, the absence of competition authority, are considered. The combination of all these factors may explain why having a knowledgeable judiciary in competition law was for years certainly not a priority in Mexico.

While the claims about the pertinence of specialisation in competition seem to hold true according to the tentative conclusions offered by this

research project, the arguments against such pertinence look improper. The critics of specialisation in competition law have stated that judges simply need a good understanding of the meaning of fairness;[702] that practitioners need to explain the matters using simple language;[703] and that not all the matters in antitrust cases are related to economic issues, but rather some are related to procedural issues, such that any generalist judge would be expected to be well-prepared to protect procedural rights in any field.[704]

The insights offered by this research project have shown that fairness was not enough to overcome the deep lack of competition knowledge amid the judiciary. If it had been, then the preference for using procedural failures to solve the review of antitrust cases would not have been so evident; and feasibly the members of the competition tribunal who were interviewed would not have said that as specialists they felt more prepared to make quick and deeper decisions, and that the difference in terms of performance between generalist and specialist in competition law would not have been so significant.

In relation to the probability of having practitioners explaining antitrust matters in a very simple manner as a mechanism to substitute specialisation, such an option seems less practicable in the Mexican case considering that competition law or economics were not part of the law programmes, that some judges lacked basic knowledge of competition law and economics, that some judges reviewed antitrust cases once in their lifetime, and that levels of competition culture were so low.

[702] Statement by Judge Leventhal in Currie and Goodman (n 10) 81–82
[703] Rakoff (n 12) 13
[704] OECD (n 19)

Finally, regarding the claim made by Judge Dianne Wood that not all the allegations concerned involve economics, that there are many cases where the allegations refer to procedural matters and that any judge would be capable of protecting such procedural rights,[705] the argument related to procedural issues is indeed valid, but the claim that the debate rests on economics remains unclear. It could be speculated that, as was the case in Mexico, a judge may be inclined to find procedural issues to effortlessly solve the reviews while at the same time alleviating the workload.

e. Specialised competition tribunals in Latin America: Advisable?

The finding here is that all the participants unanimously recommended the adoption of this type of judiciary to some other Latin American countries, a circumstance that endorses the claims of scholars who estimate that adopting specialised competition tribunals in developing countries is advisable. For instance, Arthur argues that if a country is pursuing the development of its competition regime, and improvement in the levels of enforcement, then specialisation is the best option considering that specialist judges are superior to generalist.[706]

The Mexican case has offered evidence about how the combination of low levels of competition knowledge whose review process was undertaken by a judiciary and emerging or weak competition agencies applying new or modernised competition regimes negatively affected the development of the competition regime. This scarcity of expertise amid

[705] Wood (n 11) 7; OECD (n 19)
[706] Arthur (n 305) 77–78

the judiciary led to a tendency to solve antitrust cases based on procedural failures as a way to avoid the substantive analysis of the cases.

Having an overloaded judiciary that was i) lacking competition knowledge; ii) lacking training in competition law, and with iii) low levels of exposure to antitrust cases obstructed the implementation of competition law. Since the adoption of the specialised competition tribunal, Mexico has improved the review process of antitrust cases in terms of efficiency, quality, and uniformity, so in addressing these three shortcomings it has promoted the development of the competition regime.

For this reason, the Mexican case confirms what Arthur claims about specialised competition tribunals being advisable for developing countries characterised as having undeveloped competition regimes. Assessing the score obtained by Mexico in the goods market efficiency pillar of the Global Competitiveness Index (see Section 1.2.2c), it is clear that there has been an improvement since the adoption of the specialised competition tribunal, with Mexico moving from rank 86 in 2014–2015, to rank 82 in 2015–2016, and rank 70 in 2016–2017. Similarly, the general score on this index has moved from rank 61, to 57, to 51 in the same periods.

The dataset in Chapter 1 will be used to establish which Latin American countries have undeveloped competition regimes, inferred in cases when the adoption or modernisation of both competition regimes and competition agencies has been recent, and when levels of enforcement are low. This will help determine in which Latin American countries the adoption of a specialised competition tribunal may provide similar

positive outcomes to those shown by the Mexican case. Table 5.1 condenses the information.

Table 5.1: Competition regimes, competition authorities and enforcement

Country	**New or modernised competition regime**	**Emerging or weak competition agency**	**Lower levels of enforcement than developed countries**
Argentina	✓	✓	✓
Bolivia	✓	✓	✓
Brazil	✓	✗	✓
Colombia	✓	✓	✓
Costa Rica	✓	✓	✓
Dominican R	✓	✓	✓
Ecuador	✓	✓	✓
El Salvador	✓	✓	✓

Honduras	✓	✓	✓
Mexico	✓	✓	✓
Nicaragua	✓	✓	✓
Panama	✓	✓	✓
Paraguay	✓	✓	✓
Uruguay	✓	✓	✓
Venezuela	✓	✓	✓

Table 5.1 reveals that the majority of the Latin American countries have undeveloped competition regimes, as these countries have new or modernised competition regimes, new competition agencies or limited enforcement experience, and lower levels of enforcement than developed countries (Section 2.1.3), with Brazil being the exception by having a mature competition agency. Hence, considering that De Leon[707] has asserted that agencies with limited enforcement experience require a proper judicial review to address the lack of information about administrative precedents, a situation that affects the predictability of their decisions, then the adoption of a specialised competition tribunal seems suitable to ensure a proper control of enforcement decisions, especially if such agencies enjoy both investigative and decision-making powers.

[707] De Leon (n 130) 215

The Mexican case has shown how the adoption of this specialised competition tribunal has in a short time fostered the development of the competition regime. This case is representative because it ticks all the boxes in Table 5.1 and so reveals such institutional reform as being very practical, particularly if some other hurdles like low levels of competition culture are also present.

In relation to low levels of competition culture, Fels and Ng have suggested that specialised competition tribunals are desirable in countries affected by this issue, as well as by high levels of corruption, and by lack of resources.[708] Mexico has been a representative example of a country with low levels of competition culture that have affected the development of its competition regime, also as a middle-income country, with high levels of poverty, dominance of informal markets, uneasiness in doing business, and undeveloped infrastructures. The information in Table 5.2 helps establish which other Latin American countries are also afflicted by this lack of competition culture.

Table 5.2: Levels of a culture of competition

[708] Fels and Ng (n 307) 183

Country	Income Classification (Low or Middle)	High Levels of Poverty	Low Economic Growth & Prosperity	High Barriers to Entry	High Barriers to Import	High Levels of Informal Economy	Undeveloped Infrastructure
Argentina	✓	✓	✓	✓	✓	✓	✓
Bolivia	✓	✓	N/A	✓	✓	N/A	N/A
Brazil	✓	✓	✓	✓	✓	✓	✓
Colombia	✓	✓	✓	❖	✓	✓	✓
Costa Rica	✓	✓	❖	❖	❖	✓	✓
Dominican R	✓	✓	✓	✓	❖	✓	✓
Ecuador	✓	✓	✓	✓	✓	✓	✓
El Salvador	✓	✓	✓	✓	❖	✓	✓
Honduras	✓	✓	✓	✓	✓	✓	✓
Mexico	✓	✓	✓	❖	❖	✓	✓
Nicaragua	✓	✓	✓	✓	❖	N/A	✓
Panama	✓	✓	❖	❖	❖	✓	❖
Paraguay	✓	✓	✓	✓	✓	✓	✓
Uruguay	✗	✗	✓	✓	✓	✓	❖
Venezuela	✓	✓	✓	✓	✓	N/A	✓

✓ Presence of the issue ✗ Absence of the issue

❖ Moderate presence of the issue N/A Information not available

The analysis of the data also reveals that the majority of the Latin American countries largely shared the indicators of low levels of competition culture, except Uruguay, Panama and Costa Rica. Colombia, Dominican Republic and El Salvador have one issue with moderate levels, but a prominent presence in the rest, thereby still reflecting low levels of competition culture.

Of the rest of the Latin American countries under examination, Brazil, Ecuador, Honduras and Paraguay show a significant presence on all the indicators, which translates to very low levels of competition culture. In this context, and based on the findings from the ICN study that proposed that competition culture was perceived to be stronger in countries with specialist competition tribunals,[709] then the adoption of a specialised competition tribunal would be advisable in Colombia, Dominican Republic, El Salvador, Brazil, Ecuador, Honduras and Paraguay.

In relation to corruption, neither the interviewees nor the law project nor the debates inside the Mexican parliament mentioned it as an obstacle that has disturbed the development of the competition regime or hindered the levels of enforcement in Mexico. However, it is possible that the interviewees may have preferred to avoid comments about this very sensitive topic, and the same reasoning might apply to the terms of the law project and the parliamentary debates.

Notwithstanding the absence of mentions of corruption during the interviewees' interactions and the parliamentary debates, Chapter 3 has revealed that the judiciary in Mexico has been observed as corrupt, creating a lack of confidence among the citizens who have been

[709] ICN (n 20) 8

disinclined to bring their disputes before the judges. Similarly, Chapter 1 has shown that corruption is a common hurdle among Latin American countries, being the most problematic factor for doing business in five Latin American countries, and the second-most in three others.

Similarly, the most recent surveys conducted by Latinobarometro on behalf of Transparency International between May 2016 and December 2016 have indicated that 40% of people across Latin America consider that judges and magistrates are corrupt; over two-thirds consider that corruption has increased; half of the Latin American populous agree that governments are not doing enough to fight it; and over 90 million people across Latin America have had to pay a bribe to access public services, courts included.[710] The levels of corruption in Latin America have also been assessed quantitatively by Transparency International, by which a rank indicates the corruption perceptions among 180 countries (180 = highly corrupt), and a public sector corruption score (0 = highly corrupt/100 = very clean).[711]

Likewise, corruption has been measured using the WJP Rule of Law Index 2017–2018, a tool designed to offer an image of the extent to which 113 countries adhere to the rule of law in practice, where the most significant indicator is corruption.[712] Table 5.3 summarises the data.[713]

Table 5.3: Levels of corruption

[710] Coralie Pring, 'People and Corruption: Latin American and the Caribbean' (2017) Transparency International 5
[711] Transparency International <https://www.transparency.org/country> accessed 28 June 2018
[712]<https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf> accessed 28 June 2018
[713] Pring (n 730) 15, 18, 19

Country	Transparency International /180 (worst)	Corruption Score 0 (highly corrupt) /100 (very clean)	Rule of Law Final Rank/113 (worst)	Bribery	Courts
Argentina	85	39	46	16%	1–10%
Bolivia	112	33	106	28%	1–10%
Brazil	96	37	52	11%	1–10%
Colombia	96	37	72	30%	11–20%
Chile	26	67	27	22%	1–10%
Costa Rica	38	59	24	24%	1–10%
Dominican R	135	29	90	46%	11–20%
Ecuador	117	32	85	28%	1–10%
El Salvador	112	33	79	31%	1–10%
Honduras	135	29	103	33%	51%
Mexico	135	29	92	51%	1–10%
Nicaragua	151	26	99	30%	1–10%
Panama	96	37	61	38%	10–20%
Paraguay	135	29	N/A	23%	1–10%
Peru	96	37	60	39%	1–10%
Uruguay	23	70	22	22%	1–10%
Venezuela	169	18	113	38%	41–50%

Considering that the majority of the Latin American countries are corroded with high levels of corruption, with Honduras and Venezuela in particular showing the highest levels of bribery in the courts, the adoption of specialised competition tribunals with better knowledge of competition law and able to provide decisions more efficiently, uniformly, and accurately, should help combat such afflictions. This assumption confirms the findings of the study by Albanese and Sorge, which proposes that well-functioning judicial systems serve as a deterrent to corruption or, in other words, that inefficient judicial systems serve as an incentive to corrupt deals.[714]

Finally, in relation to the lack of resources mentioned by Fels and Ng as a reason why the adoption of specialised competition tribunals is to be recommended, this research project has highlighted the high rates of poverty among Latin American countries; with a vast percentage of them belonging to the group of upper-middle income or lower-middle income countries, and greatly dependent on the incomes generated by informal economies.

While it has been confirmed that the majority of Latin American countries lack resources, one caveat needs to be mentioned: the lack of qualitative data regarding the cost of adopting the specialised competition tribunal in Mexico. Nonetheless, we should point out that since existing generalist judges were moved to be specialist ones, the adoption of this tribunal did not entail the creation of additional posts, and even the selection process did not appear to be expensive.

[714] Albanese and Sorge (n 181) 3

In this sense, having seen the benefits that this specialised competition tribunal has provided in a short period of time, Latin American countries may find it beneficial to adopt this type of judiciary as a way to remedy similar issues, to strengthen their economies, and to improve the levels of acceptance and legitimacy of their judiciaries.

The outcomes of this research project have also validated the argument provided by Savrin in favour of specialised competition tribunals in developing countries. According to Savrin, judges in developing countries have very low levels of exposure to antitrust cases and low levels of competition knowledge, which makes it unreasonable to expect that a generalist judge would be able to handle these types of cases in an efficient and proper manner, characterised as they are by novelty and complexity.[715]

The Mexican case has been a clear example of a judiciary that has had very low levels of exposure to antitrust cases and low levels of competition knowledge, as well as a good illustration of the extent to which competition law is novel and complex. Indeed, a member of the specialised competition tribunal asserted that it would be a '*fiction*' to expect a generalist judge to perform as well as a specialist judge, a statement that confirms Savrin's assertion.

In relation to the arguments opposing the adoption of specialised competition tribunals in developing countries, Aditya Bhattacharjea has claimed that developing countries should focus their scarce resources on fighting hard-core cartels, and investigating cases that bring a significant

[715] Savrin (n 214) 126

benefit to the poor.[716] The findings of this research project could potentially dismiss this argument if future research were able to confirm that the design and functioning of the specialised competition tribunal in Mexico was inexpensive.

Assuming that the adoption of such a specialised tribunal was indeed inexpensive, it could be speculated that such institutional reform could produce further achievements in the short term, such as the development of the competition regime, and improvements in the levels of enforcement and levels of legitimacy of the judicial branch. Long-term gains such as economic growth, reduction of levels of corruption, and reduced levels of informal economy could also be attained. Consequently, it would be unreasonable to limit the efforts of the judiciary to fighting cartels or only the most harmful conducts.

Accordingly, the findings of this research project should not be taken in isolation from the above arguments, and should not be applied broadly, as Section 5.2 will explore in more detail.

5.2. LIMITATIONS OF THE FINDINGS

5.2.1. Scope

The findings of this study do not imply that the adoption of specialised competition tribunals will be advisable in every case. As has been established, the Mexican case has been marked by specific characteristics that have made the adoption of this type of judiciary justifiable, and confirmed the presumed benefits of efficiency, quality, and uniformity.

[716] Bhattacharjea (n 287) 65

If a country suffers from a deep lack of competition knowledge, a deep lack of competition culture, with competition regimes recently adopted, competition agencies newly created, highly concentrated markets, uncompetitive markets, underdeveloped competition regimes, and low levels of enforcement, then the adoption of a specialised competition tribunal seems appropriate. It could be speculated that this type of tribunal will offer the same positive outcomes in terms of efficiency, quality, and uniformity as shown by the Mexican case.

On the contrary, if a country does not suffer simultaneously and severely from all the issues and causes mentioned above, it could be said that the adoption of a specialised competition tribunal does not seem necessary, and that the implementation of diverse alternative measures will equally bring improvements in terms of efficiency, quality, or uniformity.

Thus, if the findings of this study were to be replicated, in order to obtain the same positive benefits and justify the option of a specialised competition tribunal, then some of the obstacles experienced in Mexico should be present in the mirroring case. Further research is desirable to investigate whether specialised competition tribunals are equally beneficial in countries where the circumstances experienced in Mexico are absent. The implications of such a study will bring more certainty.

5.2.2. Research methodologies

a. Qualitative

As a caveat, due to time and funding limitations, it was not possible to interview some members of the OECD, in particular those who produced the studies recommending the adoption of specialised competition tribunals to some Latin American countries. As a result, the analysis of the evidence used by this international organisation to generate such a conclusion is missing from this research project, so future research in this area would be useful.

The same situation occurred with market players. This researcher intended to interview some members of different industries in Mexico with the aim of exploring their views about the adoption and functioning of the specialised competition tribunal in this country. Nonetheless, due to time and funding constraints it was not possible to proceed.

b. Quantitative

- Efficiency

The finding about how beneficial the adoption of the specialised competition tribunal in Mexico has been in terms of efficiency has to be read with the caveat of the lack of qualitative comparative data analysis about the time previously required to obtain a review judicial decision in an antitrust case compared to the time required now. This research project is therefore only able to support the findings about qualitative data analysis, in this case, the perceptions of the interviewees.

- Costs examination

Although it seems that the adoption of the specialised competition tribunal in Mexico was not an expensive choice, considering that administrative courts and administrative magisters or judges were transformed into specialists as a devised scheme to allow the functioning of the new tribunal, this research project does not have costs information about this aspect.

- *Examination of cases*

This research project would have benefited from an examination of previous decisions made by generalist judges, and some decisions made by the specialised competition tribunal. Nevertheless, such an examination was not provided due to scarcity of financial resources and time constraints. At the same time, the collection of data in this regard proved cumbersome, which complicated the task. Finally, as stated in Chapter 2 with regard to the difficulty of analysing the quality of the judicial decisions, this research limited its scope to the insights of the interviewees.

5.3. RECOMMENDATIONS

5.3.1. RECOMMENDATIONS FOR FUTURE RESEARCH

Having outlined the possible limitations faced by this research project, we now look at potentially valuable areas for further study:

a. Scope

With a view to expanding the findings of this research project, it would be useful to investigate whether a developing country suffering from a deep lack of competition knowledge; a deep lack of competition culture; competition regimes recently adopted; competition agencies newly created; highly concentrated markets; uncompetitive markets; and low levels of enforcement would experience the same positive outcomes in terms of efficiency, quality, and uniformity as shown by the Mexican case by adopting a specialised competition tribunal.

Equally, it is important to analyse whether different measures, such as training generalist judges in competition law to, would prove equally effective in remedying the issues listed above as a way of testing the necessity of adopting specialised competition tribunals. Further research is also desirable to investigate whether specialised competition tribunals are equally beneficial in countries where the circumstances experienced in Mexico are absent. The implications of such a study would be wider.

b. Qualitative analysis: OECD and market players

Further research should include an investigation into which evidence the OECD has used to recommend the adoption of this type of judiciary in Latin American countries, especially in Mexico. The findings in this regard may confirm or contest the claim made by Baum that the adoption of this type of judiciary tends to be made inadvertently rather than determinedly. At the same time, the inclusion of the insights of market players will enrich the considerations of the real benefits that specialised tribunals may offer.

c. Quantitative analysis: Efficiency

A future study testing whether the adoption of a specialised tribunal has improved levels of efficiency would be even more forceful if it were to include quantitative data analysis that compares the time required to obtain a review decision before and after the adoption of such tribunals. Similarly, a comparison between decisions made by generalist with those made by specialists.

d. Quantitative analysis: Costs examination

Analysis of detailed data costs in future research is important to confirm the suggestion that the adoption of the specialised competition tribunal in Mexico was not an expensive choice. Without further research into this matter it will not be possible to confirm that the model adopted in Mexico has had reasonable costs, so caution needs to be taken if emulation is contemplated, to avoid the risk of economic detriment in the transplanted country.

5.3.2. RECOMMENDATIONS FOR FURTHER POLICY

For countries seeking to implement a specialised competition tribunal in an attempt to obtain the similar positive results shown by the Mexican case, the following recommendations seem relevant:

1. It is indispensable to take into account local needs, local knowledge, and local experience.
2. It is important to consider different design models and give preference to the most suitable regarding local needs.

3. Consideration of advantages, disadvantages, or limitations is essential.
4. Careful scrutiny of the institutional transplantation is imperative, in terms of whether the adoption of the new body will bring the desired outcomes, and over what time period.
5. Before the specialised competition tribunal starts its functions, it is critical that training be provided for the members of the tribunal, so that they will be already knowledgeable.
6. Tenure periods of six or seven years seem reasonable. Less time would be impractical, and more years would increase the risk of capture.
7. Good salaries and benefits are important to avoid the risk of capture.
8. The rotation of the members of the tribunal is important, and it should happen gradually to avoid them all changing simultaneously.
9. Perhaps the jurisdiction of the specialised tribunal should include some other matters such as telecommunications or intellectual property, to justify its adoption in terms of the volume of cases.

CONCLUSIONS

This research aimed to provide empirical evidence about the real benefits of specialised tribunals, focusing particularly on the performance of the recently adopted tribunal system in Mexico. Such evidence clarifies whether the adoption of this institutional reform improved the three main types of constraints that usually afflict the judiciaries: efficiency, quality, and uniformity. The findings of the research around this system contribute to a deeper understanding of the nature, magnitude and most significant deficiencies associated with its implementation. At the same time, the findings offer significant lessons to Latin American countries facing similar challenges, which, when carefully implemented, could solve these challenges quickly and with a rational use of their scarce resources.

a. Research questions

This concluding chapter consolidates the findings of the thesis thematically, in light of the research questions discussed in the introduction. In relation to the first research question: ***Has the specialised competition tribunal in Mexico been beneficial in terms of efficiency, quality, and uniformity, and has it been afflicted by loss of independence?***, it has been indicated that the adoption of the specialised competition tribunal in Mexico improved all three of these factors. The findings were grounded on the perceptions of the interviewees, as discussed in Chapter 4. Such an outcome is essential to remedy the lack of empirical evidence within the relevant literature as exposed in Chapter

2, and also to guide future efforts or initiatives to tackle similar constraints by adopting specialised tribunals.

While the reflections of the interviewees, particularly the insights of the members of the specialised competition tribunal, provide this research project with special importance, additional research applying qualitative methods to investigate the efficiency factor would be extremely beneficial. In time, further records and information will be available and will also facilitate this task considerably.

In response to the second research question: ***Has the adoption of the specialised competition tribunal in Mexico been a product of inadvertence rather than design?***, this research confirms the claim made by Baum[717] around the adoption of this type of judiciary without sufficient reflection. Analysis of the governmental proposal and the subsequent parliamentary debates regarding the adoption of a specialised competition tribunal in Mexico (Chapter 3) demonstrated the absence of discussions about studies, lessons, or any other type of data that might confirm the appropriateness of such institutional reform. Although the initiative has been positive, it is important that, in future, adequate debates considering institutional design, alternatives, limitations and empirical evidence take place to ensure a greater degree of accuracy in this matter.

Notwithstanding the limited examination of the necessity and design of a specialised competition tribunal in Mexico, this thesis demonstrated nevertheless that such an initiative came from within the judiciary and the Mexican government (Chapters 3 and 4). Such a bottom-up approach

[717] Baum (n 7) 5

explains the achievement shown by this specialised tribunal. This approach proves useful in expanding the understanding of how institutions or lessons should be transferred, in the light of the theory of transplants as developed in Chapter 1. Another significant implication to emerge from this research is that unless prevailing informal institutions, local needs and local expertise are considered, it is unlikely that positive transplantations of formal institutions or lessons will be attained.

In answering the third research question: ***Is competition law a complex field in Latin American countries such that the adoption of specialised competition tribunals seems necessary?***, this thesis has identified that, in Mexico, competition law is a very complex field. The interviewees generally agreed on this, as well as on the deficiency of the law programmes, the lack of competition knowledge amid the judiciary, the insufficiency of training in competition law, the novelty of the matter, the low levels of exposure to antitrust cases and the workload as aggravating factors that made the field even more complex. The combination of all these problems made the adoption of a specialised competition tribunal indispensable.

The implication of this finding is that if some other Latin American countries exhibit the same problems, and to the same extent, it is plausible that the adoption of a specialised competition tribunal would be the most suitable solution. Similar research exploring alternative remedies such as generic training would be useful to either confirm that specialisation is the most practical and effective solution, or to gain new visions that could assist Latin American countries in utilising their insufficient incomes.

Referring to the fourth research question: ***Would specialised competition tribunals outperform general tribunals in Latin American countries?***, the data reported here supports Judge Posner's[718] assumption that it is unrealistic to expect an average judge to fully understand the complexity that an antitrust case offers. This position is enhanced by Baye and Wright who have also claimed that it is very unlikely that a judge without an economic training could come to the right decision in antitrust cases based purely on precedents, untrained intuition, or by interpreting the law.[719]

The members of the specialised competition tribunal in Mexico, who previously were generalist judges responsible for solving antitrust cases, reflected on this finding. The assessment (Chapter 4) of those who were previously involved in efforts to solve such complex cases without sufficient knowledge of competition law or economics, with infrequent opportunities to work on such cases, and with an excessive workload, represents a vital insight. These factors emerge as a reliable predictor of a similar situation in some other Latin American countries (Chapters 1 and 5) afflicted by ineffective judiciaries, low levels of a culture of competition, and deficient implementation of competition law. This finding suggests that it is very improbable that in this region general tribunals would outperform specialised competition tribunals.

The second major finding with regard to this research question is that the Mexican case has shown that a sense of fairness, as was argued by Judge Leventhal,[720] was not enough to overcome the lack of understanding of competition law among generalist judges, or in other words, did not

[718] Baye and Wright (n 9) 4
[719] Posner (n 235) 91–99
[720] Judge Leventhal in Currie and Goodman (n 10) 81–82

prevent them from selecting the use of procedural irregularities to avoid the substantive analysis of the matter (Chapter 4). It also allows us to predict that if generalist judges in other Latin American countries face the same constraints, a sense of fairness may not be sufficient to overcome them. It might work in countries with a long history of competition law, with strong enforcement bodies, and with high levels of a culture of competition, but certainly not in the good number of Latin American countries which are still in the process of learning by doing (Chapter 1).

Finally, in relation to the fifth research question: ***Are specialised competition tribunals advisable for Latin American countries?***, this thesis has found that the interviewees unanimously recommend the adoption of a specialised competition tribunal (Chapter 4) and identify the judiciary in Mexico as one of the main obstacles in the implementation of competition law. The relevance of these findings is that once some other Latin American countries also identify the performance of the judiciary as a significant deficiency, which Chapter 1 has previously anticipated, then the lessons that the Mexican case offer may be used as a reference to solve such an issue.

b. Lessons

The broad lessons that Latin American countries can learn from this case are summarised as follows. First, Chapter 3 has recognised that the major drawback in the implementation of competition law is the lack of political support. Mexico was a clear example of governments disregarding the importance of competition, and actively controlling the functioning of the markets, as well as the creation and prolongation of monopolies. This lesson signifies that the first crucial step from governments is the

recognition of the importance of competition, the identification of the obstacles that impede its effective implementation and the evaluation of the most suitable solutions.

The second lesson is that it is preferable that the initiative comes from within local governments. Chapter 3 outlined the OECD's recommendation of the adoption of a specialised competition tribunal in Mexico, yet this research was limited for the reasons stated in Chapter 5 with regard to the absence of the data used by the OECD to reach this conclusion. However, Chapter 5 confirmed that such a recommendation gained more weight after the local government requested it. The major implication here is that although the recommendations given by international organisations are highly regarded by developing countries (Chapter 2), options where local needs, limitations and expertise are contemplated predict greater chances of positive outcomes (Chapter 1).

The third lesson is that if one of the main obstacles in the implementation of competition law is the judiciary, then the adoption of a specialised competition tribunal is advisable, particularly if the judiciaries are unreliable and ineffective (Chapter 1). It is doubly advisable where corruption is embedded, where there is a lack of resources and of competition knowledge amid the judiciary, a deficit of a culture of competition, and limited opportunities to develop expertise in competition. The adoption of a tribunal that is beneficial in terms of efficiency, quality, and uniformity remedies or lessens the above constraints. In relation to a lack of resources, it is important to point out that although this research project has assumed that the adoption of the specialised competition tribunal in Mexico was an inexpensive choice, further research is essential to confirm the assumption.

The fourth lesson is that any intended reform should include a wider picture of the competition landscape. The adoption of a specialised competition tribunal will not be effective if there are other hurdles affecting the implementation of competition law. The Mexican case has clearly illustrated how the *amparo* action obstructed the normal functioning of the competition authority and the judiciary (Chapter 3). If the introduction of such a reform does not include further constitutional or legal reform required to solve some other related barriers, then the performance of this type of judiciary will be compromised. Equally, sufficient debates and analysis are necessary to ensure a proper diagnosis of the nature of all the issues, and to wisely choose among the different alternatives to solve them.

This research has revealed that the adoption of a specialised competition tribunal in Mexico seems to be a positive institutional reform. Latin American reformers may find the experience of Mexico to be a useful reference. Nevertheless, it is important to pay close attention to the transplantation phenomenon, because lessons cannot simply be transplanted; they need to be carefully adapted to avoid rejection, as Chapter 1 has explained thoroughly. Once the adaptation is complete, the following specific recommendations may help lead to better results.

c. Recommendations

Training: the members of the specialised competition tribunal should be trained (for at least 6 months) prior to the tribunal's implementation, and this training should be delivered continuously after.

Salaries: to attract good candidates and to ensure that they remain working for the judiciary, attractive salaries and benefits should be provided.

Rotation: periods of 6 or 7 years seem reasonable for judges to develop proper expertise and to avoid capture. The rotation should happen gradually to prevent changing all the members of the specialised tribunal at the same time.

Jurisdiction: if the number of antitrust cases is not significant, some other fields should be included in the remit of the tribunal to make the institutional reform worthwhile. For instance, intellectual property, telecommunications, consumer protection, etc.

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APPENDIX

1. Ethical approval

Queen Mary
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Queen Mary Ethics of Research Committee
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c/o Dr Maria Ionnidou
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25th August 2016

To Whom It May Concern:

Re: QMREC1786a – Are specialised competition tribunals beneficial for Latin American Countries? Mexico as case study.

I can confirm that Ms Claudia O'Kane has completed a Research Ethics Questionnaire with regard to the above research.

The result of which was the conclusion that her proposed work does not present any ethical concerns; is extremely low risk; and thus does not require the scrutiny of the full Research Ethics Committee.

Yours faithfully

Ms Hazel Covill – QMERC Administrator

Patron: Her Majesty the Queen
Incorporated by Royal Charter as Queen Mary and Westfield College, University of London

2. Repository of the analysis of the interviews

		1)OECD's recommendation was right?	2)Who made the efforts made	a) Were they necessary?	3)Most important input	a)What could be improved?	4)Situation without the Tribunal	Corruption	Independence	Efficiency	5)Differences in terms of quality of the decisions?	Uniformity	6)Differences gral vs spec judge in compet	Situation in Latinamericia	7)Are Spec Trib in Compet advisable x LatinAmerican countries?	8) Capture
PRACTITIONERS	A	Yes	Cofece, OECD,Cal reform 2013	Yes	Knowledge,respect x Cofece's decisions,development of the compet regime,	Uniformity,consistency	lack of enforcement, lack of development of the compet regime, lack of compet culture	Yes	No	Yes	Yes	No	Yes	Yes	Yes	No
	B	Yes	Cal reform, new compet regime	Yes	creation of jurisprudence	more training is required to make them specialist	Judges lacking the knowledge of the compet regime	Its too early to tell	/	/	Yes (but risk of corruption)	Yes	Yes	Similar situation	Yes	Yes
	C	Yes (But the members of the tribunal are not experts)	new competition regime	Yes (but not enough)	Nothing (their decisions are politicized)	specialisation, more training	The situation would be the same, as the specialised trib doesn't have specialist	She doesn't know	No (decisions of the tribunal are based on public politics)	Yes	No	Yes	Yes	Yes	Yes	Yes
	D	Yes (but there is judicial capture)	Cofece	Yes (but now they are too deferent with the authorities)	credibility to the "rule of law"	the judges need more training (English), different sources of training; less defference;to go deeper in the analysis	Lack of uniformity;more tecnicism, avoids ridiculous decisions; eliminates forum shopping; avoids capture;avoids rare	Yes (but too much deference)	Yes (but the Tribunal is too close to the authorities, government, OECD)	Yes (but the Judges and Magisters shouldn't rely	Yes (but with less deffe rence)	Yes (but sometimes they are creating public politics)	Yes	Unclear answer	Yes (but not necessarilly as depends on the own circumstances of the country)	No (captured by the authorities - deffer ence)

		1)OECD's recommendation was right?	2)Who made the efforts made	a) Were they necessary?	3)Most important input	a)What could be improved?	4)Situation without the Tribunal	Corruption	Independence	Efficiency	5)Differences in terms of quality of the decisions?	Uniformity	6)Differences gral vs spec judge in compet	Situation in Latinamerica	7)Are Spec Trib in Compet advisable x LatinAme countries?	8) Capture
							amparo decisions;			entirely on the drafts presented by their assistants)						
	E	Yes (as a result of a request made by the Cofece)	Cofece, Pacto por Mexico	Yes	judges who know about competition law	training; long tenure; periods ending at different times; wider scope (finance, transport, energy)	efficiency; efficacy;	Note vidence of corruption before or now	It has been independent	Yes	Yes	Yes	Yes	Difficult to say	Yes (but including more areas)	Less risk if there are more judges, and the scope is wider
	A	Yes	Pacto por Mexico	Yes	Certainty	tenure	length of the cases; procedural review rather than substancial; understanding and interpretation of economic	/	/	Yes	Yes (definitely)	Yes	Yes (because of the exposure)	A general judge is in a disadvantage position because of the exposure to	Yes (recurrency is what makes a difference)	Yes (but being a Tribunal is less likely)

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							concepts							the matter		
	B	Yes (more substantial analysis; uniformity; knowledge of economic issues; efficiency	Cal reform	Yes	Definition of concepts; jurisprudence, interpretation	tenure	same as before (forum shopping, length of the cases; lack of uniformity)	/	/	/	Before of the reform there were good decisions, but now are more uniform; and less focus on procedural issues	Yes (gives certainty)	Yes (less tendency to focus on procedural issues)	Yes	Yes (the Mexican experience has been positive)	No (It is easier to vigilate less judges)
COFECE	C	Yes	Cal reform	Yes	quality, and efficiency	Economist as part of the staff	forum shopping, capture	/	/	Yes	Yes	Yes	Yes (Because of the knowledge)	Unclear answer	May be	No (there are some measures taken by the Tribunal to avoid this)

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	D	Yes	Cal reform, Cofece (Eduardo Perez), Mag Tron Petit, Pacto por Mexico	Yes	anlysis of the cases is more substancial than procedural; more examination of economic term; more definition of economic terms	Designation of the new members of the tribunal (they should be trained in advance)	Same as it was before (contradictory decisions; lack of uniformity due to the high number of judges resolving the same case)	/	/	/	Yes (The analysis is deeper) It is possible to distinguish if a decision was made by a general or by specialised judge	Yes	The capacities are the same, but the analysis is different due to the specialisation	She prefers not to say anything about this	Yes (but the scope should be wider, not just competition)	No (they have good salaries, good benefits)
	E	Yes	Cofece, CSJF ,Supreme Court, Pacto por Mexico	Yes	Efficiency	The specialisation, the training should start before the designation of the judges	The analysis is concentrated in this tribunal; avoids that hundreds of judges across the coutry has jurisdiction; the specialisation allows that by repetition they know about the matter, they focus; avoids proced				Yes (better quality, the decisions solve the substantive issues)	Yes	they have the same capacities, but the specialisation allows them to perform differently	If the training is provided before becoming specialists	Yes (because are similar, we face the same issues)	Yes (that is why rotation is important)

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							ural focus									
	F	Yes	Different sectors	Yes	It has given power to the competition authorities	More tecnicism; a desire to anlyse deeper; they are more familiar with the concepts	Hundreds of judges with the possibility of solving the cases (sometimes for the first time in their lifes), lack of knowledge; length of the cases; in DF judged overloaded so solving based on procedural issues most of the time				Yes (in general, although in the past there were good decisions)	Its too early to tell, but so far no	The issue is no the capacities (its more about work load, and specialisation)		Yes (the field is really complicated)	Not (as their periods are short which is also a backlash)
	A	Yes	Cal reform, OECD	Yes	Enforcement; make the competition authorities more efficient; review process more efficient; definition of concepts	Training (specially before the designation)	The whole system would be less efficient	/	/	/	The are making big efforts, plus spend more time undesrtanding the issues, and	Yes (Thanks to the contradiction of thesis procedure)	Its not about capacities, its about specialisation (It is difficult to know the	No (It is not enough to know the regime)	Yes	It is likely, that's why measures are required

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											solving them		field without training)			
TRIBUNAL	B	Yes	Jean Claude Petit, Members of the judiciary, OECD, Calreform	Yes	The competition authorities are taken more seriously	More areas should be included (energy, intelectual property)	The decisions of the competition authorities, and the regulators would be ineffective	/	/	/	Yes	Yes	The general judge won't have the capability to understand the problem	Read it again	Yes	Yes (but they have taken some measures) also the general judge could be captured due to the lack of knowledge
	C	Yes	Pacto por Mexico	Yes	Now there is a definition of concepts	Workload (More tribunals are required)	Like before (not solving substantive issues, and lack of uniformity)	/	/	/	Yes (definitely)	Yes	capacity to solve in gral, but you need the specialisation to be solve quicker, and deeper	She perceives that the gral judges have now a more reduced knowledge compare to the specialists	Yes (widely)	She rejects the idea of capture. Tenure impacts this (but beyond capture is being attached to certain ideas)

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	D	Yes (number of cases)	Pacto por Mexico, Cal reform, legal reform	Yes	Efficiency, deeper analysis of the cases, trust in the functioning of the institutions; empowerment of the competition authorities	When the cases go to the Supreme Court it takes time to have a decision	Lack of knowledge, and decision making delays	/	/	/	Yes (it has moved from procedural to substantial analysis)	Yes	Technical capacities	Mixed tribunals don't have the same level of expertise	Yes	She didn't agree or disagree/Measures should be taken